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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

EARTH ISLAND INSTITUTE, MARINE MAMMAL FUND and DAVID R. BROWER,
Petitioners,

vs.

RONALD H. BROWN, Secretary of Commerce; D. JAMES BAKER, Administrator of the National Oceanic and Atmospheric Administration; ROLLAND A. SCHMITTEN, Assistant Administrator of the National Marine Fisheries Service; and LLOYD E. BENTSEN, Secretary of the Treasury,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does 28 U.S.C. § 1581(i)(3) deprive the federal district courts of jurisdiction to construe and enforce provisions of environmental protection statutes such as the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, that impose conditions on certain imports as one part of a comprehensive program to remedy a problem (the protection of dolphins and the marine ecosystems) unrelated to international trade?

PARTIES

Pursuant to Rule 29.1, petitioners disclose that none of them has any parent or subsidiary companies. The parties to this petition are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Earth Island Institute, Marine Mammal Fund and David R. Brower (collectively, "Earth Island") respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit on an important issue concerning the subject matter jurisdiction of the federal district courts, as well as the scope of the exclusive jurisdiction of the Court of International Trade ("CIT") under 28 U.S.C. § 1581(i)(3). The Court of Appeals' decision was wrong because, among other reasons, it conflicts with this Court's opinion in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988).

OPINIONS BELOW

The February 3, 1992 decision of the United States District Court for the Northern District of California is reported at 785 F. Supp. 826 and is reprinted in Appendix A in the separately bound appendix to this petition (cited "Pet. App."), Pet. App. at A-1 through A-18.[1] The United States Court of Appeals for the Ninth Circuit issued an opinion in this matter on March 3, 1994, which was reported at 17 F.3d 1241. Following a timely petition for rehearing with suggestion for rehearing *en banc*, the Court of Appeals withdrew its March 3, 1994 opinion on June 28, 1994. The June 28, 1994 amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at 28 F.3d 76 and is reprinted in Appendix B to this petition, Pet. App. at B-1 through B-8.

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[1]As set forth in that decision, the February 3, 1992 Order superseded prior orders of the District Court dated January 10 and January 27, 1992. Neither of these superseded orders is included in the appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on June 28, 1994. By Order dated August 1, 1994, the Court of Appeals denied Earth Island's petition for rehearing and suggestion for rehearing *en banc*, as of July 5, 1994. A copy of that Order is reprinted in Appendix C to this petition, Pet. App. at C-1 through C-2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition relates to the federal district courts' jurisdiction to construe and enforce various provisions of the Marine Mammal Protection Act, codified as amended at 16 U.S.C. §§ 1361-1421h (the "MMPA"). Most particularly in issue here are the MMPA-imposed conditions, codified as amended at 16 U.S.C. § 1371(a)(2)(C), on the importation of yellowfin tuna from so-called intermediary nations.[2] Section 1371(a) provides, in pertinent part:

§ 1371. Moratorium on taking and importing marine mammals and marine mammal products

(a) Imposition; exceptions

. . .

---

[2]Since the District Court's decision on conditions on importation of tuna from intermediary nations, Congress has amended certain provisions of the MMPA, including Section 1371(a)(2)(C). International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 3425 *et seq.* (1992) (the "IDCA"). The 1992 amendments do not affect the jurisdiction question presented here. For the Court's convenience, relevant portions of the MMPA as amended are reproduced in Appendix D to this petition, Pet. App. at D-1 through D-30.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may issue therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For the purposes of applying the preceding sentence, the Secretary --

. . .

(C) shall require the government of any intermediary nation to certify and provide reasonable proof that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B).

. . .

Also in issue in this petition are two statutes governing the subject matter jurisdiction of the federal courts. The first is 28 U.S.C. § 1331, which provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The second is 28 U.S.C. § 1581(i), which provides, in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for --
>
> . . .
>
> (3) embargoes or other quantitative restrictions on importation of merchandise for reasons other than the protection of the public health or safety; . . . .

STATEMENT OF THE CASE

Earth Island commenced this action in 1988 to compel various agencies of the federal government to enforce MMPA provisions that Congress enacted to limit the incidental killing and injury of dolphins by "purse seine" tuna fishing fleets in the Eastern Tropical Pacific Ocean (the "ETP"). For reasons that are not altogether understood, schools of yellowfin tuna in the ETP tend to aggregate in the water just below schools of dolphins. Tuna fishing fleets in the ETP historically have exploited this phenomenon, seeking out, or, in the industry's jargon "fishing on" or "setting on," schools of dolphins in an effort to maximize their yellowfin tuna catch. Once the schools are spotted, tuna fishing boats then deploy, or set, huge nets called purse seines and encircle the dolphin schools. After the schools are encircled, the top of the net is pulled tight, closing like a drawstring purse around the tuna, but also around the dolphins. The mammals caught in the purse seines are often killed or seriously injured because they are unable to surface to breathe air, and try mightily to free themselves to avoid suffocation.

Dolphins are highly intelligent and peaceful creatures, whose brain size and capacity for social interactions are comparable to humans'. Unfortunately, the commercial tuna

industry has killed more than six million dolphins since the advent of purse seining in the 1960s. Predictably, dolphin populations have suffered serious declines as a result; today many dolphin species have been listed as "depleted" within the meaning of the MMPA. *See* 16 U.S.C. §§ 1362(1), (8) & (10).

A. The MMPA.

Beginning with the original passage of the MMPA in 1972, Congress has expressed concern over the dramatic impact that purse seine fishing has had on dolphin populations, and on the implications for the ecosystem generally of diminished dolphin populations and the extinction of several dolphin species. *See generally* 16 U.S.C. § 1361 (congressional findings and policy statement). The MMPA and its implementing regulations direct a wide range of actions and prohibitions designed to protect marine mammals.[3] As originally enacted, the MMPA focused primarily on standards for domestic tuna fishing operations, with the express purpose of reducing the killing of marine mammals "to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a).

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[3]For example, different MMPA provisions require studies of dolphin populations, 16 U.S.C. §§ 1373(f), 1414(a)(4); mandate certified observers onboard domestic vessels fishing in the ETP, *id.* § 1374(h)(2)(B)(viii); fund research on alternative fishing techniques, *id.* §§ 1380, 1374(h)(2)(B)(v); ban sets at or around sunset, *id.* §§ 1371(a)(2)(B)(ii)(I), 1374(h)(2)(B)(iv); prohibit using certain explosives for fishing, *id.* § 1374(h)(2)(B)(vii); and require harvesting nations to adopt regulatory programs to achieve dolphin mortality rates that are comparable to those of the U.S. tuna fishing fleet as a condition to importing yellowfin tuna into this country, *id.* § 1371(a)(2)(B).

Controls on the domestic fishing fleet proved insufficient to end the dolphin slaughter.[4] Notwithstanding the MMPA's protections, millions of dolphins in the ETP continued to be killed by purse seine tuna fishing operations, increasingly at the hands of foreign fishing vessels. *See* 16 U.S.C. § 1411(a) (congressional findings supporting the IDCA). Accordingly, Congress amended the MMPA in 1984, Pub. L. No. 98-364, 98 Stat. 440 *et seq.*; in 1988, Pub. L. No. 100-711, 102 Stat. 4765 *et seq.*; and again in 1992 with the IDCA, Pub. L. No. 102-523, 106 Stat. 3425, to add, and progressively to limit NMFS' discretion in the implementation of, provisions conditioning the importation into this country of yellowfin tuna on foreign fishing fleets' compliance with U.S. fishing standards.

Among these provisions is Section 1371(a)(2)(C), the MMPA provision considered by the Court of Appeals in this appeal. Section 1371(a)(2)(C) prohibits the transshipment through intermediary nations of tuna caught on dolphins by countries not complying with U.S. standards. To ensure that tuna that could not be imported to this country directly under Section 1371(a)(2)(B) is not imported to the United States indirectly, Section 1371(a)(2)(C) conditions the importation of

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[4]In part, this was owing to virtual non-enforcement of the MMPA by the federal agencies, including the National Marine Fisheries Service ("NMFS"), charged with doing so. The government's ongoing disregard for the dolphin-tuna law -- a disregard that the Court of Appeals recognized and condemned in a previous opinion in this lawsuit, *see Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991), *aff'g* 746 F. Supp. 964 (N.D. Cal. 1990) -- was the reason Earth Island was forced to bring this action.

yellowfin tuna from intermediary nations upon the receipt of certain certifications from the intermediary nation's government.[5]

B. The Litigation.

As mentioned, Earth Island has been prosecuting this case now for six years, seeking court intervention to require the government, primarily through NMFS, to enforce the numerous mandates of the MMPA that the agency has ignored. Provision by provision, the District Court has directed NMFS to do what the plain language of the MMPA requires[6] -- language that the

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[5]Under the current version of Section 1371(a)(2)(C), the intermediary nation must certify that it has not, in the past six months, imported yellowfin tuna or tuna products that could not have been imported into the United States directly by the country of origin. This differs somewhat from the certifications that were required before the IDCA was enacted.

[6]Earth Island has obtained injunctions: (1) requiring that all U.S.-certificated tuna vessels fishing within the ETP carry a certified observer on board to monitor fishing operations (Order of Jan. 18, 1989); (2) prohibiting the Secretary of Commerce from certifying that a foreign nation's fishing practices are comparable to those of the United States unless and until the Secretary makes positive findings that the incidental taking of dolphins by vessels of those foreign nations is no more than twice that of U.S. vessels during the same period (Order of Aug. 28, 1990); (3) requiring that the agency's kill calculations for eastern spinner dolphins be based upon an entire fishing season (Order of Oct. 19, 1990, published at 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991)); (4) requiring any nation seeking to export tuna to the United States to demonstrate that its dolphin kill rate is no more than 1.25 times that of the U.S. fleet (Order of Mar. 26, 1991); (5) prohibiting the importation of yellowfin tuna absent satisfaction of certain preconditions (Order of Feb. 3, 1992 and the subject of this petition); and (6) prohibiting any vessel in the U.S. fleet from setting nets on the

agency simply and unlawfully disregarded in the absence of these court directives.[7] Most of the injunctions issued by the District Court now have become final injunctions, but several matters, including the import conditions on intermediary nations in issue here and prohibitions on tuna fishing on certain dolphin species that are depleted, *e.g.*, 16 U.S.C. § 1371(a)(3)(B), remain unresolved.

C. Proceedings Relating to This Petition.

In late 1991, Earth Island filed a motion with the District Court for entry of a preliminary injunction barring the importation of tuna through intermediary nations in violation of 16 U.S.C. § 1371(a)(2)(C). After full briefing and argument, the District Court, on February 3, 1992, issued the Order that

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depleted offshore spotted dolphin (Order of Jan. 27, 1994, *appeal pending*, No. 94-15602 (9th Cir.)).

[7]Repeatedly, the District Court and the Court of Appeals have chastised the agency for failing to enforce the MMPA, and thereby forcing petitioners to monitor NMFS' enforcement activities closely and to prosecute their serial requests for injunctive relief when NMFS failed properly to enforce the law and negotiation with the agency did not remedy the problem. For example, in an earlier appeal in this case, the Court of Appeals noted "the agency's own record of non-enforcement of congressional directives," and concluded that "the government's position is at odds with both the language and the purpose of the MMPA, and the agency's intended role under it . . . ." *Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991). Similarly, the District Court has held several times that the agency simply has ignored the plain language of the MMPA. *E.g.*, Order of Aug. 28, 1990 ("Congress clearly intended the statutory scheme it established to reduce unnecessary dolphin deaths. The Secretary of Commerce's failure to enforce the statute's clear requirements interferes with this scheme, and therefore assures the continued slaughter of dolphins.").

is the subject of this appeal, enjoining the government from "permitting the importation" of yellowfin tuna and tuna products from an intermediary nation "until" the government obtains certification and proof that the intermediary nation did not obtain the tuna from countries that engage in fishing practices prohibited by the MMPA. Pet. App. at A-1 through A-18.[8]

The government asked the District Court to stay its February 3, 1992 Order, arguing, among other things, that the import restrictions would interfere with unspecified foreign policy objectives of this country. In connection with its stay request, the government also argued for the first time (and almost four years into the litigation) that the District Court lacked jurisdiction to enter the injunction. Under 28 U.S.C. § 1581(i)(3), the government argued, questions concerning enforcement of Section 1371(a)(2)(C) were within the exclusive jurisdiction of the CIT. The District Court denied the stay, as did the Court of Appeals when the government renewed its motion there.

After merits briefing and oral argument, the Court of Appeals vacated the District Court's Order, concluding that Section 1371(a)(2)(C)'s import limitations constitute an "embargo" on imports of yellowfin tuna from intermediary nations within the meaning of 28 U.S.C. § 1581(i)(3). As such,

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[8]As mentioned, *supra* note 6, an injunction requiring the government to enforce restrictions on the direct importation of yellowfin tuna caught by foreign fleets pursuant to 16 U.S.C. § 1371(a)(2)(B) was previously entered by the District Court, *see Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990), and affirmed by the Court of Appeals, 929 F.2d 1449 (9th Cir. 1991). Following the Court of Appeals' affirmance of that preliminary injunction, the government stipulated to entry of a permanent injunction on identical terms.

the Court of Appeals held that construction of the provision is within the CIT's exclusive jurisdiction.[9]

The District Court's February 3, 1992 Order also has led to litigation outside of the courts of the United States. First Mexico, and later the European Community, challenged the propriety of enforcing the MMPA's import conditions (pursuant to the District Court's injunction) before dispute panels of the General Agreement on Tariffs and Trade ("GATT"). In two decisions that have sparked vigorous discussion on issues of trade versus the environment, the GATT panels ruled that the MMPA provision at issue here was GATT-violative. *See* Report of the Panel, "United States -- Restrictions on Imports of Tuna," DS29/R (June 1994) (hereinafter cited "GATT Rep. DS29/R"). Neither of the panel decisions has been adopted by the GATT counsel or otherwise become effective to date.

REASONS FOR GRANTING THE PETITION

This Court should review the Court of Appeals' decision for three reasons. First, the determination that the import conditions in Section 1371(a)(2)(C) constitute an "embargo" conflicts with this Court's decision in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988), and with decades of previously unquestioned district court authority to construe and enforce

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[9]In its initial opinion, issued March 3, 1994, the Court of Appeals remanded the case with instructions that the lawsuit be dismissed. When Earth Island pointed out in its rehearing petition that the lawsuit included a large number of MMPA issues, many of which had nothing to do with the tuna imports, or restrictions thereon, the Court of Appeals, on June 28, 1994, withdrew its March 3 opinion and issued an amended opinion. Pet. App. at B-1 through B-8. In the June 28 opinion, the Court of Appeals remanded "for further proceedings consistent with this opinion." Pet. App. at B-8.

complex environmental statutory schemes, including with respect to the many statutes that include import conditions among their broad remedial programs.

Second, the approach taken by the Court of Appeals runs counter to Congress' stated purposes behind Section 1581(i)(3). With that provision, Congress acted to clarify the CIT's jurisdiction over areas of particular CIT competence and expertise -- specifically, the resolution of disputes arising out of tariff and international trade laws. Rather than clarify the jurisdictional limits, however, the Court of Appeals' approach will mean that litigants seeking to enforce a myriad of environmental or other statutes having only a peripheral connection with international trade will confront difficult problems figuring out where the district courts' jurisdiction ends and the CIT's jurisdiction begins. Moreover, litigants may well find themselves having to resort to multiple fora to seek enforcement of different portions of the same statute, an inefficient result that also raises the spectre of inconsistent results.

Finally, because the primary purpose of the MMPA is directed toward maintaining the health and stability of the marine ecosystem, rather than international trade, Section 1581(i)(3) does not apply to the MMPA at all. Instead, the MMPA falls within Section 1581(i)(3)'s exception for trade restrictions that relate to public health and safety.

A. The Court of Appeals Misapplied This Court's Decision in *K Mart* To Hold That the Import Preconditions in Section 1371(a)(2)(C) Constitute an Embargo, Disrupting Previously Unquestioned Federal Question Jurisdiction over Cases Under the MMPA and Other Environmental Statutes That Include Trade-Related Remedies.

The central error below was the Court of Appeals' determination that the import preconditions of Section 1371(a)(2)(C) constitute an "embargo" for purposes of Section 1581(i)(3). This determination conflicts with this Court's

decision in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988), which is the leading precedent interpreting Section 1581(i)(3). It also conflicts with decades of unquestioned district court authority under 28 U.S.C. § 1331 to construe and enforce a wide range of environmental and other complex statutory schemes that happen to include, among their broad remedial provisions, some import restrictions.

In *K Mart*, this Court made clear that "not every governmental importation prohibition is an embargo." 485 U.S. at 187. "An embargo is a '[g]overnment order prohibiting commercial trade with individuals or businesses of other nations.'" *Id.* at 184 (quoting *Black's Law Dictionary* 468 (5th ed. 1979)). Thus, as the Court explained, a statute that conditions the importation of gray-market goods on consent of the trademark owner, regulations that bar importation of milk and cream except by a permitholder and except with appropriate labeling, and regulations that mandate inspection of certain meat products before they may be imported, are not embargoes. *Id.* at 184-87. This is so even though such statutes and regulations implicate trade policy.[10]

Applying this "ordinary meaning" approach, Section 1371(a)(2)(C) does not erect a trade embargo. To begin, the provision is not directed to international trade; it is an

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[10]The Court of Appeals appears to have focused in part on the fact that the import restrictions in issue in *K Mart* were triggered by private parties seeking to enforce private rights, rather than governmentally imposed import restrictions. *See* Opinion, Pet. App. at B-6 through B-8 (citing *K Mart*, 485 U.S. at 185). While this was the factual context of *K Mart*, the *K Mart* decision read as a whole does not recognize such a dichotomy. There are multiple examples discussed in *K Mart* of *governmentally* imposed import restrictions – like Section 1371(a)(2)(C) – that do *not* constitute embargoes. *See* 485 U.S. at 186-90.

environmental protection statute. Moreover, nothing in Section 1371(a)(2)(C) prohibits any nation, or any business in any nation, from selling yellowfin tuna and tuna products in this country as such. Instead, much as with the meat inspection regulations discussed in *K Mart*, *see* 485 U.S. at 187, Section 1371(a)(2)(C) merely establishes a condition precedent to importation – specifically, a certification that the exporting country had not imported yellowfin tuna in the previous six months from a nation that could not export the tuna to the United States directly because of its non-compliance with enumerated U.S. fishing standards. 16 U.S.C. § 1371(a)(2)(C). Once an intermediary nation has satisfied the condition, tuna canners can import five, ten or ten thousand tons of tuna from the country. There is, accordingly, no "embargo or other quantitative restriction" within the meaning of the CIT jurisdiction statute.[11]

The fact is that federal district and appellate courts have historically played an important role in enforcement of the MMPA's multiple and varied remedies to protect dolphins and

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[11]In *K Mart*, this Court termed "unnatural" an attempt to characterize import prohibitions on uninspected meat as an embargo. 485 U.S. at 187. Merely because the Customs Service can prohibit entry of uninspected meat, these import limitations do not "magically become an embargo of uninspected (but not necessarily tainted) meat[.]" *Id.* Section 1371(a)(2)(C)'s requirement of certifications from intermediary nations before yellowfin tuna can be imported, is no more of an embargo than the meat inspection requirements discussed by the Court in *K Mart*. The MMPA imposes no *quantitative* restrictions (including an absolute limit of zero, as a true embargo restriction would).

marine mammals.[12] The Court of Appeals' Opinion would transfer this important role to the CIT and the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(5).[13]

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[12]The Ninth Circuit Court of Appeals alone has rendered at least five decisions over the past decade construing different MMPA provisions. *See United States v. Hayashi*, 5 F.3d 1278 (9th Cir. 1993) (holding that steps taken to deter porpoises from eating fish off fisherman's line did not support criminal conviction for taking porpoises "knowingly"); *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991) (affirming injunction directing enforcement of tuna import conditions on primary nations); *United States v. Clark*, 912 F.2d 1087 (9th Cir. 1990) (upholding constitutionality of Alaskan natives' subsistence exemption), *cert. denied*, 498 U.S. 1037 (1993); *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668 (9th Cir. 1988) (reversing preliminary injunction prohibiting female observers); *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir.) (*en banc*) (upholding constitutionality of observer requirement), *cert. denied*, 476 U.S. 1252 (1984).

[13]Of course, courts in the Ninth Circuit are not the only federal district and appellate courts that have routinely exercised jurisdiction to construe the MMPA and other statutes that include import restrictions of various kinds. *See, e.g., Sweet Home Chapter of Communities for a Great Oregon v. Babbit*, 17 F.3d 1463 (D.C. Cir. 1994) (Interior Department regulations promulgated under the Endangered Species Act); *Strong v. United States*, 5 F.3d 905 (5th Cir. 1993) (MMPA regulations concerning the feeding of wild dolphins); *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359 (5th Cir.) (challenge to agency regulations relating to Section 17(d) of the Poultry Products Inspection Act, 21 U.S.C. § 466(d), which prohibits importation of poultry unless it is subjected to the same inspection procedures to which U.S. poultry is subject), *opinion amended on other*

But the Court of Appeals' decision promises an effect far broader than just MMPA enforcement. It will also oust federal district and appellate courts from their traditional role in the enforcement of a variety of *other* critical environmental statutes whose remedial schemes also include importation preconditions that may be classified, under the Ninth Circuit's logic, as embargoes. Among the many statutes that include import restrictions of this sort are the:

- Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (import restrictions in Section 1825);

- Pelly Amendment to the Fisherman's Protective Act of 1967, 22 U.S.C. § 1978 (import restrictions in Section 1978(a)(4));[14]

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grounds, 9 F.3d 1113 (5th Cir.), *petition for rehearing en banc granted*, 9 F.3d 1116 (5th Cir. 1993); *National Coalition Against Misuse of Pesticides v. E.P.A.*, 867 F.2d 636 (D.C. Cir. 1989) (challenge to EPA decision to permit continued use of existing stocks of certain pesticides, the importation of which were banned by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y); *Citizens To End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993) (MMPA challenge to proposed dolphin transfer from aquarium site to navy site) (case dismissed on standing grounds); *Bays' Legal Fund v. Browner*, 828 F. Supp. 102 (D. Mass. 1993) (MMPA challenge to construction of sewage release system); *Animal Protection Inst. of Am. v. Mosbacher*, 799 F. Supp. 173 (D.D.C. 1992) (challenge to a permit issued to allow importation of marine mammals).

[14]The certification procedures of the Pelly Amendment were reviewed by this Court in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). *See infra* note 15.

- Migratory Bird Treaty Act of 1916, 16 U.S.C. §§ 701-718 (import restrictions in Section 703);
- Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773-773k (import restrictions in Section 773e(5));
- South Pacific Tuna Fishing Act of 1988, 16 U.S.C. §§ 973-973r (import restrictions in Section 973c(a)(13));
- Whaling Convention Act of 1949, 16 U.S.C. §§ 916-916*l* (import restrictions in Section 916c);
- Tuna Convention Act of 1950, 16 U.S.C. §§ 951-9621 (import restrictions in Section 957(c));
- Atlantic Tuna Convention Act of 1975, 16 U.S.C. §§ 971-971i (import restrictions in Section 971e(d));
- Eastern Pacific Tuna Fishing Act of 1984, 16 U.S.C. §§ 972-972h (import restrictions in Section 972f(a)(6));
- Pacific Salmon Treaty Act of 1985, 16 U.S.C. §§ 3631-3644 (import restrictions in Section 3637); and
- Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (import restrictions in Section 1538).

See also statutes cited *supra* in note 13.[15]

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[15]The issue presented here appears to be one of first impression in all of the Courts of Appeals, save the United States Court of Appeals for the Ninth Circuit. While this appeal was pending, the Ninth Circuit held that the import restrictions in the Endangered Species Act constituted embargo provisions for Section 1581(i)(3) purposes, and so affirmed dismissal of a portion of a lawsuit brought to compel government enforcement of import restrictions on shrimp harvested in a manner that kills sea turtles. *See Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993) (*"Sea Turtles"*).

Aside from *K Mart*, this Court has addressed the issue presented only inferentially, but again in a manner inconsistent with the Court of Appeals' approach here and in *Sea Turtles*. In *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221

The Court of Appeals offers no justification for this result, which is particularly troubling in light of the absence of any particular expertise in the CIT and the Federal Circuit in environmental protection, and, indeed, these courts' acknowledged expertise elsewhere. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 49 (1980) (hereinafter cited "H.R. Rep. No. 1235"), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3760 (CIT's expertise extends to "questions concerning classification, valuation or markings"). In *K Mart*, this Court expressly cautioned that in enacting Section 1581(i)(3), Congress did *not* intend to give the CIT jurisdiction over matters outside its predecessor's expertise:

> Nor is there any indication (aside from Petitioner's strained reading of the term "embargo") that Congress wished the new institutions [the CIT and Federal Circuit] to acquire expertise in the area in which its predecessors had none.

485 U.S. at 189. Yet this is precisely the result of the Court of Appeals' Opinion.

This petition thus raises significant policy issues as well, in particular the extent to which international trade issues and concerns will be permitted to subsume environmental legislation. The GATT decisions concerning the import conditions of Section 1371(a)(2) indicate that, in the view of the panels that decided them, environmental regulations must yield to unrestricted free trade. *See generally* GATT Rep. DS29/R. But while even final GATT decisions do not "trump domestic

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(1986), this Court accepted jurisdiction over claims to enforce statutory conditions to fishing in U.S. fisheries even though the statute also provides for an import ban on fish products from countries whose fishing practices threaten endangered species. *See* 22 U.S.C. § 1978. The Court did so without questioning the district court's jurisdiction over these claims despite the presence of such a ban in the statutory scheme. *Id.* § 1978(a)(4).

legislation,"[16] the piecemeal relegation of portions of important environmental statutes to specialized U.S. trade courts might. The District Court in this matter has presided over six years of litigation concerning numerous complex questions under different MMPA provisions. The government's suggestion, years into the case, that the dispute ought to be bifurcated, and important parts of the MMPA construed by the former Customs Court, trivializes the importance not just of the MMPA, but of numerous environmental and other statutes that historically have been interpreted and enforced by the district courts. This was not Congress' intent when it enacted 28 U.S.C. § 1581(i).

B. The Court of Appeals' Approach Conflicts with the Legislative Purpose Behind Section 1581(i)(3), and Promises Litigants Uncertainty as to Where a Lawsuit Should Be Brought and Piecemeal Litigation in Multiple Fora, with the Possibility of Inconsistent Results.

The decision below also merits review because if it is permitted to stand, it promises judicial diseconomies both through collateral litigation over the proper forum for resolution of particular issues and the need for litigants to prosecute the same basic lawsuit in more than one court. Quite apart from the difficulties this creates for the judicial system, the approach conflicts with the legislative purpose of Section 1581(i)(3).

The legislative history of the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, makes clear that Section 1581(i)(3) was enacted to correct inequities that resulted from conflicting judicial decisions relating to district court jurisdiction to consider classification and valuation disputes concerning

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[16] *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1366 (5th Cir. 1993); *accord Algoma Steel Corp. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989) ("[s]hould there be a conflict [between a U.S. law and GATT], the United States legislation must prevail").

imports to this country. *See* H.R. Rep. No. 1235 at 19, 1980 U.S.C.C.A.N. at 3730-31.[17] Because of the limited powers of the CIT's predecessor (the Customs Court) before Section 1581(i), litigants would attempt to have such disputes heard in the district courts, where they had an opportunity to obtain full relief if the court accepted jurisdiction. There were, however, inconsistent court decisions about district court jurisdiction to hear such matters; and a dismissal for want of jurisdiction, in many cases, effectively precluded a judicial determination of the case. *See generally id.* at 18-20, 1980 U.S.C.C.A.N. at 3729-32.

Section 1581(i) thus was intended "to eliminate the confusion that currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade" to ensure that litigants, who had previously found themselves caught either without a remedy for classification and valuation disputes, or without a court in which to enforce their remedy, had their disputes "heard on the merits." *Id.* at 47, 1980 U.S.C.C.A.N. at 3759.

The dispute here does not concern classification or valuation issues, however; and the litigants here did not lack an adequate forum. Far from simplifying anything, the Court of Appeals' construction of Section 1581(i)(3) will, if permitted to stand, significantly complicate litigation that is generally unrelated to international trade, such as the lawsuit here.

This action has involved disputes over a large number of MMPA provisions, only a portion of which have anything to do with international trade. The result under the Court of Appeals' approach is that trade-related issues will be heard in one forum,

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[17]The legislative history is devoid of any reference to situations like this one, where litigants are working through the courts to enforce statutes with a primary purpose unrelated to international trade, but with some trade-related remedies to help ensure that domestic standards will have some meaning.

the CIT, while disputes relating to other parts of the same statute will be considered by the district courts.[18] This is problematic at several levels.

First, it is very difficult to parse out what pieces of these statutes are trade-related and what pieces are not, and it sometimes depends on the context in which the dispute arises. For example, 16 U.S.C. § 1374(h) grants a general permit to the American Tunaboat Association to take marine mammals as an incident to yellowfin tuna fishing in the ETP under certain specified conditions. Because Section 1374(h) on its face relates to tuna fishing by the domestic fleet, one presumes that the district courts have the authority to construe and enforce it even under the Court of Appeals' decision.

There are contexts, however, in which portions of Section 1374(h) can have an indirect trade impact. For instance, 16 U.S.C. § 1371(a)(2)(B) links the ability to import tuna to the United States to whether an exporting country has a regulatory program restricting the taking of marine mammals as an incident to tuna fishing that is "comparable" to the regulatory program

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[18]This is precisely the approach the Court of Appeals took in the *Sea Turtles* litigation. In that case, plaintiffs brought two claims under the Endangered Species Act, 16 U.S.C. §§ 1531-1544, providing for protection of sea turtles from the harmful effects of shrimp trawling: (1) that the government was not properly enforcing limitations on shrimp importation, including a ban on importation for nations whose fishing techniques harmed sea turtles; and (2) that the government had not initiated treaty negotiations to protect sea turtles as allegedly required by the statute. *See Sea Turtles*, 6 F.3d at 650. Only the first claim was dismissed on jurisdiction grounds, the Court of Appeals holding that the import limitations underlying this claim constituted an "embargo" within Section 1581(i)(3) that could be heard only by the CIT. *Id.* at 652. There was no issue of the district court's subject matter jurisdiction to hear the second set of claims, however. *Id.* at 653.

here. The provision also requires the foreign fleet's rate of incidental dolphin kill to be "comparable" to the kill rate by the domestic fleet.[19] The Court of Appeals' decision leaves unclear what court will construe Section 1374(h) to determine what is "comparable" for Section 1371(a)(2)(B) purposes. It leaves unclear whose construction of the provision will be authoritative.

This difficulty is especially acute for a provision like Section 1374(h), which has been litigated extensively in the District Court in this action, because 16 U.S.C. § 1374(d)(6) specifically provides for judicial review in the *district courts* of disputes over permits authorizing the importation or taking of any marine mammal.[20]

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[19]The comparability requirements are actually quite complex, involving application of five additional subparagraphs of Section 1371(a)(2)(B) that themselves involve application of many other provisions of the statute. Disputes over the proper application of these provisions have been the focus of a significant portion of the litigation in this action before the District Court.

[20]Another possible illustration of this jurisdiction-boundary problem is now pending before the Court of Appeals. As mentioned above, in note 6, the District Court earlier this year granted Earth Island's request for an injunction, pursuant to 16 U.S.C. § 1374(h), barring the *domestic* tuna fishing fleet from setting nets on depleted dolphin species. But because of the manner in which the comparability standards, which govern another country's ability to export yellowfin tuna to the United States, work, these limitations on the domestic fleet have an indirect impact on international trade. *See* 16 U.S.C. § 1371 (a)(2)(B)(ii). It is difficult to believe that such an indirect impact could render the domestic regulation an "embargo," yet the government has appealed this very point. In fact, the government requested that the Court of Appeals stay proceedings in the depleted species appeal pending this Court's resolution of this

The Court of Appeals' decision invites disputes over whether particular pieces of a lawsuit should be presented to the CIT or to the district courts. As a result, it promises confusion, collateral litigation, delay in the resolution of *bona fide* disagreements and additional expense both to the litigants and to the judicial system.

Second, these jurisdictional difficulties may well arise in the context of a single lawsuit. As mentioned in footnote 18, this occurred in the *Sea Turtles* lawsuit, and it has now happened here. The Court of Appeals' decision, coming as it did six years into a lawsuit that has required and continues to require court consideration of multiple provisions of the MMPA, has obvious negative implications for judicial efficiency, cost-effective resolution of the disputes, finality and consistency. Under the Court of Appeals' Opinion, Earth Island must now travel across the country, to a forum unfamiliar with this case and without expertise with this area generally or with the MMPA in particular, to continue one portion of this lawsuit, while the remainder of the case will remain before the District Court. The result is nonsensical.

Third, the prospect of litigating pieces of the same dispute in multiple fora all but ensures inconsistency in the results. The statutory scheme in issue here and in many environmental cases is a complex one that includes difficult questions of statutory interpretation. The need for consistency in general is obvious to help resolve existing disputes and to prevent disputes in the future. Moreover, the need for consistency in resolving multiple issues within a single lawsuit cannot be gainsaid. Yet the Court of Appeals' decision is calculated to frustrate this basic principle.

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petition. The stay was denied. Thus, events in this very case subsequent to the Ninth Circuit's decision, demonstrate the decision's propensity to encourage collateral litigation wholly unrelated to the merits.

Far from providing the certainty that Congress sought when it enacted Section 1581(i), the Court of Appeals' Opinion promises confusion, uncertainty, inconsistency and a lack of finality. This Court should review the Court of Appeals' Opinion to remedy these serious infirmities.

C. The Import Conditions of Section 1371(a)(2)(C) Have Nothing To Do with International Trade and Are Instead Provisions Intended To Protect the Marine Ecosystem; As Such, Section 1581(i)(3) Does Not Apply Here.

Even if the import conditions of Section 1371(a)(2)(C) were properly seen as an embargo, the jurisdictional strictures of Section 1581(i)(3) do not apply. Under the statute, the CIT has exclusive jurisdiction only when the embargo exists "for reasons *other than* the protection of public health and safety." 28 U.S.C. § 1581(i)(3) (emphasis added).

The congressional findings and policy statements enacted as part of the MMPA, together with its legislative history, establish that the statute has nothing to do with issues of international trade. Instead, Congress recognized the role of marine mammals as "significant functioning element[s] of the marine ecosystem." 16 U.S.C. § 1361(2); *see also id.* §§ 1361(6), 1411(a)(1), 1411(a)(2), 1411(b)(1). Noting that certain species and population stocks of marine mammals were in danger of extinction or depletion as a result of human activity, *id.* § 1361(1), and that marine mammals were "resources of great international significance, esthetic and recreational as well as economic," Congress set as the MMPA's "primary objective" to "maintain the health and stability of the marine ecosystem." *Id.* § 1361(6).

These statements of legislative purpose place the import preconditions of Section 1371(a)(2)(C) within the public health and safety exception to Section 1581(i)(3). Although the MMPA is directly concerned with the health and safety of marine mammals and the marine ecosystem, protection of the ecosystem very obviously promotes human health and safety.

Cf. 42 U.S.C. § 4331 (congressional declaration of national environmental policy, recognizing, *inter alia*, "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man"). As such, the public health and safety exception of Section 1581(i)(3) should include within its scope statutes primarily concerned with maintaining or improving the environment generally, whether or not their direct focus is on human health and safety.

Furthermore, interpreting the exception in this manner is consistent with the legislative history of Section 1581(i)(3). As discussed above, the primary purpose of the jurisdictional grant in Section 1581(i) was to clarify the scope of CIT jurisdiction and to remedy the difficulty that some litigants with international trade problems had experienced finding an appropriate forum to hear their disputes over, for example, classification and valuation matters. *See supra* Part B. The public health and safety exception to sub-subparagraph 3 was added specifically because of concern that otherwise, some disputes that were in reality unrelated to international trade would end up before the CIT when they were more appropriately matters that should be heard by the district courts.

While the legislative history does not address the issue as such, Congress' commentary on the health and safety exception is instructive. According to the House Report, the American Importers Association expressed concern that Section 1581(i) as introduced, without the public health and safety exception,

> could have been interpreted to permit the [CIT] to assert jurisdiction over civil actions involving the application of the Federal Food, Drug and Cosmetics Act or the Toxic Substances Control Act to imported merchandise. *AIA believed these actions did not involve questions of classification, valuation or rate of duty* but rather questions of public health and safety. As such, it was AIA's position that those questions should be treated the same whether a court is dealing with domestic or imported goods *and more*

> *appropriately should come within the jurisdiction of the district courts.*

H.R. Rep. No. 1235 at 47, 1980 U.S.C.C.A.N. at 3759 (emphasis added). The exception accordingly was added.

The MMPA issues raised here likewise have nothing to do with classification, valuation or rates of duty. They are likewise matters that traditionally have been, and more appropriately are, considered by the federal district courts. The Court of Appeals' holding to the contrary is incorrect and should be reviewed by this Court.

CONCLUSION

The Court of Appeals' decision conflicts with prior decisions of this Court, with the legislative intent of Congress and with simple logic. The piecemeal adjudication of claims in multiple fora is inefficient, expensive and often inconsistent. For these and the other foregoing reasons, this Court should grant this petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

EARTH ISLAND INSTITUTE, MARINE MAMMAL FUND
and DAVID R. BROWER,
Petitioners,

vs.

RONALD H. BROWN, Secretary of Commerce;
D. JAMES BAKER, Administrator of
the National Oceanic and Atmospheric Administration;
ROLLAND A. SCHMITTEN, Assistant Administrator of
the National Marine Fisheries Service;
and LLOYD E. BENTSEN, Secretary of the Treasury,
Respondents

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Appendix D: Excerpts from the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (as amended)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, et al.	)	
Plaintiffs,	)	**NO. C 88 1380 TEH**
v.	)	
	)	**ORDER**
ROBERT A. MOSBACHER, Secretary of Commerce, et al.	)	
Defendants.	)	

On January 10, 1992 this Court issued its order regarding the secondary embargo provisions of the Marine Mammal Protection Act. On January 27, 1992, pursuant to Federal Defendants motion for Clarification, we issued an order amending our January 10, 1992 order. In light of a stipulation filed by the parties on January 30, 1992, we once again amend our original order as reflected herein. This Amended Order supersedes the January 10, 1992 and January 27, 1992 orders and constitutes the operative order in this case. This Amended Order does not alter the effect of the prior orders, but simply consolidates those orders.

This matter came before the Court on plaintiffs' Motion for Summary Judgement, Preliminary and Permanent Injunction. The parties argued this motion before the Court on September 23, 1991. Appearances were made by Joshua Floum for plaintiffs and Charles Shockey for defendants.

Plaintiffs brought this motion in order to enforce the secondary embargo provisions of the Marine Mammal Protection Act (MMPA). We believe that the proper interpretation of the

secondary embargo is that intermediary nations must provide to the United States government, certification and proof that they have banned from importation into their countries the same commercial fish products that the MMPA bans from direct importation into the United States from harvesting nations. Failure to provide this certification and proof results in a ban of all yellowfin tuna and tuna products from those intermediary nations. For this reason, as discussed more fully below, we GRANT plaintiffs' motion for preliminary injunction, and we DENY plaintiffs' motion for summary judgement and plaintiffs' motion for permanent injunction.

I. BACKGROUND

Tuna fishermen kill dolphins when they use purse seine fishing nets in the eastern tropical Pacific Ocean (ETP). As a result of growing public sensitivity to this incidental killing of dolphins and other marine mammals, Congress enacted the Marine Mammal Protection Act 16 U.S.C. 1371 et seq. This case is a battle between plaintiffs -- the public interest group Earth Island Institute, the Marine Mammal Fund and David R. Brower (hereinafter collectively referred to as "Earth Island") and defendants -- the Secretary of Commerce, the Administrator of the National Oceanic and Atmospheric Administration, the Assistant Administrator of the National Marine Fisheries Service (NMFS), and the Secretary of the Treasury (hereinafter collectively referred to as "the Government") over the requisites of the MMPA.

On August 28, 1990, this Court issued an order interpreting one provision of the commercial fish products ban created by the MMPA ("Aug. 28, 1990 Order"). This order enjoined the Secretary of the Treasury from allowing the importation of certain tuna products from nations which do not meet statutory measures of comparability in their incidental killing of dolphins during tuna fishing operations ("primary embargo").

Congress enacted a second provision of the commercial fish ban to respond to a perceived need to prevent "tuna laundering" -- a situation in which an embargoed nation sells its tuna to an intermediary nation which, in turn, sells the otherwise banned tuna to the United States. This provision creates a secondary embargo against intermediary nations who wish to

import tuna and tuna products into the United States ("secondary embargo").

Earth Island now moves for a preliminary injunction, a permanent injunction and summary judgement in their favor, to compel the Government to comply with the mandates of the MMPA's secondary embargo provisions. Earth Island alleges that the nonenforcement of the secondary embargo is causing irreparable harm because there continues to be a market for tuna caught with purse seines by nations subject to the primary embargo and, as a result, unacceptable numbers of dolphins die.

The relevant section of the Marine Mammal Protection Act, §1371 (a) (2), reads as follows:

> (2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may issue therefor under section 104 subject to regulations prescribed by the Secretary in accordance with section 103. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For the purposes of applying the preceding sentence, the Secretary --
>
> (A) [Text deleted]
>
> (B) [Text deleted]
>
> (C) shall require the government of any intermediary nation from which yellowfin tuna or

> tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States.

Plaintiffs and defendants agree that this section of the MMPA creates both a primary and a secondary embargo. They disagree, however, over the scope of the two embargoes.

Plaintiffs contend that the scope of the secondary embargo is broader than the scope of the primary embargo. Plaintiffs' position is that the primary embargo prohibits the importation of tuna and tuna products harvested with purse seine nets in the ETP from nations that fail to meet the comparability standards created by the MMPA ("embargoed nations"). In contrast, plaintiffs argue, the secondary embargo prohibits the importation of *all* tuna and tuna products from intermediary nations, unless the Secretary obtains proof that the nation has acted to prohibit the importation of tuna and tuna products from embargoed nations.

The rationale offered for the differing scopes of the two embargoes is that Congress had different purposes in mind in enacting the statutes. According to plaintiffs, the purpose behind the enactment of the primary ban in 1972 was to change foreign fishing methods in order to protect marine mammals. The secondary embargo, on the other hand, was enacted in 1988 to bolster the effectiveness of the primary embargo by preventing circumvention of this embargo through the use of intermediary nations.

Earth Island argues that the defendants are not complying with the mandates of the MMPA. First, they contend that the Secretary of the Treasury is not obtaining the required proof from every intermediary nation, before allowing such nations to import tuna into the United States. Second, they argue that the National Marine Fisheries Service is banning only tuna caught with purse seines in the ETP under the secondary embargo, rather than all yellowfin tuna and tuna products. For these reasons, plaintiffs

ask this Court to order defendants to revoke their current policies regarding the secondary embargo and to implement a comprehensive compliance program for the secondary embargo which would include the following elements: 1) systematic identification of all intermediary nations potentially subject to the secondary embargo, 2) determination, based on the proof provided by each intermediary nation, of whether that nation has prohibited the importation of all yellowfin tuna and tuna products from embargoed nations, and 3) a ban against the importation of all yellowfin tuna and tuna products from any identified intermediary nation for which such a determination cannot be made.

Defendants respond that they have complied fully with the requirements of the MMPA in implementing the secondary embargo. They argue that the scope of the secondary embargo is the same as the scope of the primary ban: both embargoes extend only to yellowfin tuna harvested with purse seine nets in the ETP. In addition, defendants claim that plaintiffs' suggested scope of the secondary embargo violates the Congressional purpose of the embargo. This purpose, defendants suggest, was "to prevent imports of tuna and tuna products taken with methods that harm[ed] dolphins excessively, not to punish nations by imposing trade sanctions without just cause." Defendants' Memorandum in Opposition to Motion [sic] Partial Summary Judgement and Preliminary and Permanent Injunction, at 16. Finally, defendants claim that their implementation of the secondary embargo has been consistent with the MMPA and the orders of this Court.

We will resolve this matter first, by analyzing the statutory language creating the secondary embargo, and then by examining the defendants' implementation of this embargo.

A. PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction against defendants to enjoin them from allowing the importation of tuna in violation of the provisions of the MMPA. The preliminary injunction is an equitable remedy. As such, it is an extraordinary remedy, and the burden is on the moving party to make a clear showing that money damages or other remedies at law are not

adequate under the circumstances. Wright & Miller, *Federal Practice and Procedure*: Civil § 2948 (1973).

For this Court to issue a preliminary injunction, the moving party must show either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and a balance of hardships tipping sharply in the plaintiff's favor. These are not two distinct tests but rather the opposite ends of a single continuum. *Miss World (UK) Ltd. v. Miss America Pageants, Inc.*, 856 F.2d 1445, 1448 (9th Cir. 1988). A showing of irreparable harm is a prerequisite for the issuance of a preliminary injunction in any case. *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345 (D.C. Cir. 1972). The district court has broad discretion in deciding whether or not to issue a preliminary injunction. *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087 (9th Cir. 1972).

A. PROBABILITY OF SUCCESS ON THE MERITS

(1) INTERPRETATION OF THE MMPA

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Here, as in all cases of statutory interpretation, our starting point must be the language of the statute itself. *Id.* ; *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988)

The secondary embargo is created by the following language of the MMPA:

> The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For the purposes of applying the preceding sentence, the Secretary -- (C)

> shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States.

The motions before the Court require that we determine from this language the answers to three questions: 1) which nations are subject to the certification and proof requirements of the secondary embargo; 2) which products must these nations ban in order to comply with the mandates of the statute; and finally, 3) what sanction results from an intermediary nation's failure to comply with the mandates of the statute.

Addressing the first question, application of the certification and proof requirements, we find that the language of section (C) is clear. The requirement applies to "*any intermediary nation* from which yellowfin tuna or tuna products will be exported to the United States." (emphasis added)

We note that the statute does not interpret the term "intermediary nation." Where a statute is silent or ambiguous, we will defer to the interpretation of an implementing agency so long as that interpretation is reasonable. *Chevron* 467 U.S. at 843. The NMFS regulations define an intermediary nation as "a nation which exports yellowfin tuna or tuna products to the United States, and which imports yellowfin tuna or tuna products." 50 C.F.R. § 216.3. We accept this definition as a reasonable administrative interpretation of the term.

Defendants cite language from a colloquy between senators Hollings and Breaux, for the proposition that Congress intended for defendants to have "discretion to consider [their] requirements satisfied without requiring formal government certifications when there is no reason to suspect that nations are importing tuna from embargoed nations." 134 Cong. Rec. S 17119 (Oct. 21 1988). It is well settled that "when interpreting a statute, we need not go beyond its language unless it is

ambiguous." *Green v. C.I.R.* 707 F.2d 404 (9th Cir. 1983). As noted, *supra*, this statute is clear on the question of which nations are required to provide certification and proof -- any intermediary nation. Thus, we reject defendants' characterization of Congressional intent, based as it is on defendants' interpretation of this Senatorial exchange.

Even if defendants' argument were correct, and we found that the statute were not clear on its face, the legislative discussion they cite would not help their case because it answers the wrong question. The discussion addresses the kind of certification and proof that will be required under particular circumstances. However, this discussion is not relevant to the question of which nations are required to provide certification and proof. On this basis, we dismiss defendants' reliance on this Senatorial exchange as unfounded.

The second question -- which products must intermediary nations ban in order to comply with the mandates of the statute -- is also answered by the plain language of the statute. Intermediary nations are required to prohibit the importation of "such tuna." This terminology, "such tuna," is also used to refer to the items which are banned from direct importation into the United States under § 1371 of the statute. It is a settled principle of judicial construction that when the same word or phrase is used in the same section of an act more than once, and its meaning is clear in one place, it will be construed to have the same meaning in the other place. *United States v. Nunez*, 573 F.2d 769 (2d Cir. 1978). Applying this principle, we conclude that the MMPA requires intermediary nations to ban the importation of the same products which are banned from direct import, from the harvesting nations, to the United states. For example, yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, which has been harvested by nations whose average rate of incidental taking of marine mammals exceeds the statutory measures contained in §1371 (a)(2)(B).

The final question -- what sanction results from an intermediary nation's failure to comply with the mandates of the statute -- is likewise answered by simple reference to the statute. Here, we apply the same analysis that we applied in our Aug. 28,

1990 Order. We begin with the operative language of § 1371 of the MMPA:

> The Secretary of the Treasury *shall ban the importation of commercial fish or products from fish* which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For the purposes of applying the preceding sentence, the Secretary -- (emphasis added)

In our Aug. 28, 1990 Order, we held that this clause "establishes as the status quo a ban on importation of 'commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.'" *Earth Island Institute v. Mosbacher*, 746 F.Supp. 964, 970 (N.D. Cal. 1990). The final sentence of this clause "explains that the subsequent clauses describe how to "apply [ ] the preceding sentence [the import ban]."" *Id.*

In our Aug. 28, 1990 Order we analyzed the provisions of one of the subsequent clauses, § 1371(a)(2)(B), and concluded that this clause describes the way in which the statutory ban can be overcome by foreign nations that wish to import into the United States "yellowfin tuna caught with purse seines in the eastern tropical Pacific Ocean."[1] In the present case, the subsequent clause at issue reads as follows:

> (C) shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States.

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[1]The Aug. 28, 1990 Order interpreted 16 U.S.C. § 1371(a)(2)(B), § 1371(a)(2)(B)(ii) and § 1371(a)(2)(B)(ii)(II).

With regard to this subsection (C), the statute's construction is identical to the one interpreted in our Aug. 28, 1990 Order. Thus, subsection (2) explains how the statutory ban can be overcome by intermediary nations who wish to import "yellowfin tuna and tuna products" into the United States.[2] The subsection specifies that in order to overcome the import ban, the intermediary nation must provide certification and reasonable proof "that it has acted to prohibit the importation" of those tuna products which are banned from direct export into the United States.

We are convinced that the subsection (C) creates a ban against *all* yellowfin tuna and tuna products from intermediary nations which fail to meet the subsection's certification and proof requirements. The language of subsection (C) imposes the certification and proof requirements on intermediary nations which seek to export "yellowfin tuna and tuna products" to the United States. We note that Congress, in subsection (C), chose not to modify or limit the phrase "yellowfin tuna or tuna products."

In each of the subsections of § 1371, Congress was specific in designating which commercial fish was subject to the ban. For instance, as noted in our Aug. 28, 1990 Order, subsection (B) of § 1371 extends the ban to "yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom." Subsection (E) extends the ban to "fish or products containing fish harvested by a nation whose fishing vessels engage in high seas driftnet fishing." In drafting these subsections, Congress used different terms, indeed, very specific terms, each time. Applying the principle of statutory construction that clear use of different terminology is evidence of intentional differentiation, *Tafoya v. U.S. Dept. of Justice*, 748 F.2d 1389, 1392 (10th Cir. 1984), we conclude that Congress intended the

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[2]The intermediary nation embargo provision of the MMPA refers to "yellowfin tuna and tuna products." The Court takes note that the parties to this suit agree that the term "tuna products" means *all* tuna products containing yellowfin tuna, but not products containing *only* other species of tuna such as skipjack or albacore.

subsections of § 1371 to extend the commercial fish ban to specific categories of fish. In the case of subsection (C), this ban extends to all yellowfin tuna and tuna products.

In summary, the secondary embargo provisions of the MMPA specify that in order to overcome the statutory ban and export yellowfin tuna and tuna products -- that is, any and all yellowfin tuna and tuna products -- to the United States, every intermediary nation must provide certification and reasonable proof that it has prohibited the importation of the same products which are banned from direct export to the United States. Failure to meet these requirements subjects the nation to the statutory ban which prohibits the importation of all yellowfin tuna and tuna products from that nation.

In this case, "the message conveyed by the plain language of the [MMPA] is confirmed by an examination of its history." *I.N.S. v. Cardozo Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 94 L.Ed. 2d 434 (1987). The only available legislative history discussing the scope of the secondary embargo is found in the Committee reports of the House and the Senate. These reports show that both the Senate and the House understood that the secondary embargo would ban *all* yellowfin tuna from nations subject to the ban. The Report of the House Merchant Marine Fisheries Committee stated the following:

> The Committee strongly supports this provision in order to prevent embargoed nations from circumventing U.S. restrictions thus weakening the effectiveness of U.S. law. The committee expects that all yellowfin tuna and tuna products, including canned tuna containing any yellowfin tuna, whether caught in the ETP or not, will be embargoed.

House Rep. No. 100-970, 100th Cong., 2d sess. at 30 (Sept. 23, 1988), *reprinted in* 1988 U.S. Code Cong. & Ad. News 6154; *See also*, Senate Rep. No. 100-592, 100th Cong., 2d Sess. (Oct. 7, 1988). This legislative history reinforces our interpretation of the clear language of the statute.

We reject defendants' contention that the language of these reports is contradicted and superseded by the Senate

discussion between Senators Hollings and Breaux.[3] Defendants believe that the scope of the secondary embargo is the same as the scope of the primary embargo, and that both embargoes only apply to tuna caught with purse seines in the ETP. Simply stated, this is not what the statute says, nor is it what Congress intended. On the basis of the plain language of the statute, supported by its legislative history, we reject defendants' interpretation of the statute.

(2) IMPLEMENTATION OF THE MMPA

Several government officers and agencies are responsible for the implementation of the MMPA. Plaintiffs argue that these officers and agencies have not enforced the secondary embargo as required under the act. Defendants respond that they are in compliance with the act, as they interpret it. Having found that Congress has spoken directly to the precise issue of the terms and parameters of the secondary embargo, we must reject administrative constructions that are contrary to this clear congressional intent. *Chevron*, 467 U.S. at 843, n.9.

The plaintiffs designate three areas of inadequacy in the government's enforcement of the act. We will look at each in turn.

(a). Plaintiffs allege that the defendants have disregarded the plain meaning of the statute and currently allow the importation of yellowfin tuna and tuna products from intermediary nations that admittedly import tuna from embargoed nations, so long as particular shipments to the United States were not harvested with purse seines in the ETP. The defendants do not dispute this description of their implementation, but argue that their actions meet the requirements of the secondary embargo.

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[3]Here again, defendants cite the exchange between Senators Hollings and Breaux, discussed *supra* at 9-10. This exchange is not relevant to the issue of the scope of the commercial fish ban against intermediary nations wishing to import yellowfin tuna and tuna products. The exchange speaks only to what kind of certification and proof will be required under particular circumstances.

Both plaintiffs and defendants misconstrue the plain meaning of the statute. Plaintiffs' position is wrong because the critical factor for determining whether an intermediary nation can overcome the statutory embargo is not whether that nation imports tuna from embargoed nations; but rather, whether the intermediary nation has provided certification and proof that it has prohibited the importation of that tuna which would be banned from direct export from the harvesting nation to the United States. Defendants' position is similarly flawed because when an intermediary nation fails to provide the necessary certification and proof, the statute bans the importation of all of that nation's yellowfin tuna and tuna products, regardless of where, or how, that tuna was harvested.

Defendants admit that they are allowing the importation of shipments of tuna which were not harvested with purse seines in the ETP from noncompliant intermediary nations. This being the case, we find that they are in violation of the plain language of the MMPA.

(b). Plaintiffs allege that defendants did not obtain certification and proof of compliance from all intermediary nations and yet have not subjected these nations to the secondary ban. Defendants respond that the NMFS, "(i) received evidence from the foreign government that the nation[s] did not import yellowfin tuna from the five embargoed harvesting nations trading; (ii) received a subsequent clarification that the foreign nation no longer continued to import such tuna from the embargoed nations after the embargo was in effect; or (iii) placed the nation on the list of nations subject to the intermediary embargo."

We find that, based on these allegations, defendants are not in compliance with the mandates of the MMPA. Here again, the statute is clear: the statutory embargo is overcome when an intermediary nation provides *certification and proof* that it has *prohibited* the importation of certain tuna and tuna products. The fact that a nation does not import, or has discontinued importing tuna subject to the primary embargo does not carry with it any guarantee that the nation will not import this tuna in the future. The terms of the MMPA do not lend themselves to such simple circumvention. For this reason, the requirements of the secondary

embargo are not overcome by evidence that a nation does not import tuna from embargoed nations or by evidence that the nation has discontinued the importation of tuna from embargoed nations.

(c). Plaintiffs' final argument is that, in lieu of the certification and proof requirement of the Act, the defendants use a declaration of compliance obtained from the importer to ensure that a given shipment of tuna does not contain tuna harvested with purse seines in the ETP. Defendants claim that this importer certification is a supplement to the certifications and evidence that they received from foreign governments.

Whether or not an importer certifies as to the origin of a tuna shipment is irrelevant to whether an intermediary nation has provided the necessary certification and proof to overcome the secondary embargo. The MMPA requires certification and proof from the *government* of the intermediary nation, not from a private party seeking to import the tuna. Unlike the direct embargo, where only tuna harvested with purse seines in the ETP was prohibited from entering the United States, as discussed *supra*, this secondary embargo prohibits the importation of *all* yellowfin tuna and tuna products unless these specific conditions are met.

Therefore, unless and until defendants obtain the required certification and proof from the government of an intermediary nation, defendants are in violation of the MMPA when they allow the importation of particular shipments of tuna, regardless of whether they have obtained importer certifications for this tuna.

(3) SUMMARY

The language of the MMPA is clear on its face. Administrative agencies, such as defendants, must give effect to the clearly expressed meaning of the statute. Defendants' interpretation and implementation of the MMPA are contrary to the meaning of the statute. On this basis, we find that plaintiffs' have met their burden of demonstrating probable success on the merits of this case.

B. IRREPARABLE HARM

The defendants' failure to implement the secondary embargo, as set forth in the MMPA, results in irreparable injury. The defendants' nonenforcement of the secondary embargo creates a loophole in the primary embargo and this results in the continued economic viability of harmful fishing technologies. The continued use of these technologies results in the unnecessary deaths of marine mammals. This harm to marine mammals is exactly the type of harm which the statute was designed to prevent. As we noted in our Aug. 28, 1990 Order, the risk of unnecessary dolphin deaths and injury is a sufficient display of irreparable harm to justify the granting of a preliminary injunction. *Earth Island*, 746 F.2d at 975.

On these bases: that the plaintiffs' have demonstrated probable success on the merits with respect to their claims that the defendants have failed to implement the mandates of the MMPA's secondary embargo, and that the result of this failure is irreparable harm, we **GRANT** plaintiffs' motion for preliminary injunction.

III. PERMANENT INJUNCTION

A permanent injunction is appropriate where the plaintiffs prevail on the merits and demonstrate "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Orantes-Hernandez v. Thornburgh*, 919 F.2d. 549, 558 (9th Cir. 1990), citing *LaDuke v. Nelson*, 762 F.2d. 1318 (9th Cir. 1985). A permanent injunction is available to combat a "persistent pattern of misconduct violative of plaintiffs' rights." *Id.* There must be "'something more than the mere possibility which serves to keep the case alive."' *Shanks v. City of Dallas*, 752 F.2d 1092, 1096 (5th Cir. 1985); *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.*, 747 F.2d 844, 848 (3rd Cir. 1984).

In this case, plaintiffs have not yet prevailed on the merits. In addition, they have not proven that the misconduct will continue in the absence of permanent injunctive relief. Based on these circumstances, we **DENY** plaintiffs' motion for permanent injunction at this time.

IV. SUMMARY JUDGEMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, to prevail in a motion for summary judgement, the moving party must establish: (1) that there is "no genuine issue of material fact, and (2) that the moving party is entitled to judgment as a matter of law." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978); Fed. R. Civ. P. 56(c). As to matters for which the moving party will not have the burden of proof at trial, it must "point ... out to the District Court that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986). The nonmoving party must then make a showing sufficient to establish a genuine issue of fact with respect to that matter. *Id.* All reasonable inferences from the evidence are to be drawn in favor of the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986). The moving party must show that no reasonable trier of fact could find other than for the moving party. Schwarzer, *Summary Judgement under the Federal Rules*, 99 F.R.D. 465, 487-488 (1984). In order to deny a motion for summary judgement, however, "[t]he mere existence of a scintilla of evidence would be insufficient; there must be evidence on which the jury could reasonably find for [the non-moving party]." *Liberty Lobby*, 106 S.Ct. at 2512.

Based on the existence of genuine issues of material fact, we **DENY** plaintiffs' motion for summary judgement. We take notice of the diplomatic communications of the State Department regarding the secondary embargo. Whether any of these communications contain evidence of the necessary certification of prohibition from a government official of an intermediary nation is a factual question which remains contested at this point.

After careful consideration, and upon good cause showing, **IT IS HEREBY ORDERED** that:

1) Subject to the exception for tuna currently in transit, discussed *infra* at 23, defendants, the Secretary of Commerce, the Administrator of the National Oceanic and Atmospheric Administration, the Assistant Administrator of the National Marine Fisheries service, and the Secretary of the Treasury, are enjoined

from permitting the importation into the United States of all yellowfin tuna and tuna products from any intermediary nation, until they obtain certification and proof that the intermediary nation has prohibited the importation of tuna which could not be exported directly to the United States under the provisions of the primary embargo;

2) Defendants are hereby instructed to implement forthwith a program to enforce the secondary embargo in accordance with the provisions of the MMPA as set forth in this Order. This plan shall include the systematic identification of all nations which import yellowfin tuna, and which export yellowfin tuna to the United States. In addition, this plan shall require that an official of the government of *each* of these identified nations provides certification *and* proof that that nation has acted to prohibit the importation of tuna that is barred from direct importation into the United States under the terms of the MMPA, including tuna and tuna products which were harvested by embargoed nations with purse seine nets in the eastern tropical Pacific Ocean;

3) We take note of the burden that this Order may impose upon American companies who have already purchased tuna through intermediary nations. At the same time, we take note of the fact that the secondary embargo provisions of the MMPA were enacted and placed on the books in 1988. This being the case, we are convinced that companies were on notice that the secondary embargo would ban the importation of tuna from noncompliant intermediary nations and that they should adjust their purchases accordingly. Nonetheless, in the interests of fairness, **IT IS ORDERED**: that this injunction shall not apply to yellowfin tuna and tuna products which are currently in transit as of the date of this order. It shall apply to all yellowfin tuna and tuna products exported after Thursday, January 30, 1992.[4]

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[4]The term "exported" refers to the date that the tuna physically leaves the intermediary nation and starts its trip towards the United States.

4) In accordance with the January 30, 1992, stipulation entered by the parties, for the purposes of this injunction, the following language shall constitute an acceptable form of "certification" and "reasonable proof" as those terms are used in the MMPA, 16 U.S.C. (a)(2)(c), and NMFS regulations, 50 C.F.R. 216.24(e)(ix):

> ... An intermediary nation may provide a written legal instrument or document as evidence that (a) it has acted to ban the import into that nation of yellowfin tuna and tuna products containing yellowfin tuna that are banned from direct export to the United States and (b) that the legal action to prohibit the import of tuna is enforceable by that nation. This legal instrument or document may consist of a legislative enactment, an executive order or decree, or administrative action by a responsible government official from the intermediary nation, provided that the action is taken in accordance with that nation's system of law. A responsible government official from the intermediary nation shall forward a copy of that written instrument or document, along with a certification attesting that the document is accurate, through appropriate diplomatic channels to the Assistant Administrator for Fisheries in the Department of Commerce, who promptly will determine whether the document and certification constitute "reasonable proof" by the intermediary nation, as prescribed in the NMFS regulations. The Assistant Administrator promptly will publish the determination in the Federal Register and advise the United States Customs Service whether further exports from that intermediary nation shall be allowed. This language does not preclude proof of foreign law by any means authorized under Fed. R. Civ. P. 44(a)(2), (b), (c), or 44.1.

IT IS SO ORDERED

DATE: 1/31/92

THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARTH ISLAND INSTITUTE, a California nonprofit corporation; MARINE MAMMAL FUND, a California corporation; DAVID R. BROWER, Plaintiffs-Appellees, v. RONALD H. BROWN,* SECRETARY OF COMMERCE, et al., Defendants-Appellants, and AMERICAN TUNABOAT ASSOCIATION; JOSEPH J. MEDINA, JR. and MANUEL A. SILVA, Defendants-Intervenors.	Nos. 92-15126 92-15387 D.C. No. CV-88-01380-TEH **ORDER AND OPINION**

Appeal from the United States District Court
for the District of Northern California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
August 10, 1993—San Francisco, California

Opinion Filed March 3, 1994
Opinion Withdrawn June 28, 1994
Filed June 28, 1994

Before: Joseph T. Sneed, Cecil F. Poole, and
Stephen S. Trott, Circuit Judges.

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* Ronald H. Brown, the current Secretary of Commerce, is substituted for former Secretary Robert A. Mosbacher. *See* Fed. R. App. P. 43(c) (1).

Opinion by Judge Poole

SUMMARY

International Law/Trade/Litigation and Procedure (Civil)

The court of appeals vacated a district court order and remanded. The court held that plaintiffs' suit under the Marine Mammal Protection Act (MMPA) seeking to require the government to enforce bans on the importation of certain tuna, was within the exclusive jurisdiction of the Court of International Trade (CIT).

Appellees Earth Island Institute, Marine Mammal Fund, and David Brower sued appellants, several public officials including Ronald Brown, Secretary of Commerce, seeking to require the government to enforce the MMPA. The plaintiffs moved for an injunction regarding the government's failure to implement bans on importation of tuna from "secondary" or "intermediary nations" as required by the MMPA. The district court granted a preliminary injunction. The officials appealed, contending that exclusive subject matter jurisdiction over the dispute was vested in the CIT.

[1] Under 28 U.S.C. § 1581, the CIT has exclusive jurisdiction over civil actions against the government that arise out of laws providing for certain types of embargoes. [2] The MMPA involves a "governmentally imposed quantitative restriction" on importing merchandise. The MMPA therefore is a statute providing for an embargo under the ordinary meaning of the term.

[3] In addition, the Supreme Court has concluded that § 1581 extends jurisdiction to all kinds of embargoes, not just those rooted in trade policy or import transactions.

[4] Thus, Earth Island's suit under the MMPA was an action arising under a law providing for embargoes. As such, it was reserved to the exclusive jurisdiction of the CIT. The district court lacked jurisdiction to enter the preliminary injunction.

COUNSEL

Martin W. Matzen, United States Department of Justice, Washington, D.C., for the defendants-appellants.

Joshua R. Floum and Deborah A. Sivas, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the plaintiffs-appellees.

ORDER

The Opinion filed March 3, 1994 is **WITHDRAWN**.

OPINION

POOLE, Circuit Judge:

Appellants Secretary of Commerce, Administrator of the National Oceanic and Atmospheric Association, Assistant Administrator of the National Marine Fisheries Service, and Secretary of the Treasury appeal the district court's grant of a preliminary injunction in favor of plaintiffs Earth Island Institute, the Marine Mammal Fund, and David R. Brower. Because we find the district court lacked jurisdiction to issue such an injunction, we reverse.

I

On April 12, 1988, plaintiffs filed suit seeking to require the government to enforce the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1406. On August 26, 1991, plaintiffs moved for partial summary judgment and a preliminary and permanent injunction regarding the government's failure to implement bans on importation of tuna from "secondary" or "intermediary nations" as required by 16 U.S.C. § 1371(a) (2) (C).[1] The district court entered an order granting the motion for preliminary injunction but denying the motions for summary judgment and permanent injunction. *Earth Island Institute v. Mosbacher*, 785 F. Supp. 826, 828 (N.D. Cal. 1992).

Appellants argue that under 28 U.S.C. § 1581(i)(3), exclusive subject matter jurisdiction over this dispute is vested in the Court of International Trade (CIT), and that the district court thus lacked jurisdiction to enter the preliminary injunction. This court reviews the district court's jurisdiction *de novo*. *United States v.*

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[1]Section 1371(a) (2) (C) reads as follows:

> (2) . . . The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary—
>
> . . .
>
> (C) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B).

Peralta, 941 F.2d 1003, 1010 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1484 (1992).

II

[1] Under 28 U.S.C. § 1581:

> (i) . . . the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> . . .
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.

We must decide whether plaintiffs' MMPA suit to enforce an import ban absent required government certifications is an action which arises out of a law "providing for embargoes."

In *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 184 (1988), the Supreme Court addressed the meaning of 'embargo' as that term is used in 28 U.S.C. § 1581, and held that the statute should be construed using the "ordinary meaning" of the word. Thus, "[a]n embargo is a '[g]overnment order prohibiting commercial trade with individuals or businesses of other nations.' It is '[a] policy which prevents goods from entering a nation' and which 'may be imposed on a product or on an individual country.'" 485 U.S. at 184 (citations omitted). The Court concluded that "the meaning that Congress apparently adopted in the statutory language . . . is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise." *Id.* at 185. Examples of embargoes "for reasons other than the protection of public health or safety" are prohibitions of importation of obscene pictures, lottery tickets, and articles for

causing unlawful abortion, 15 U.S.C. § 1397, importation of goods from Cuba, 22 U.S.C. § 2370(a), importation of switchblade knives, 15 U.S.C. §§ 1241–1244, and fur-seal or sea-otter skins, 19 C.F.R. § 12.60 (1987). 485 U.S. at 184.

At the same time, the Court made it clear that the term 'embargo' does not, for purposes of § 1581(i), encompass all importation prohibitions, but rather names a subclass of importation prohibitions. The holding of *K Mart*, for instance, is that 19 U.S.C. § 1526, which makes it "unlawful to import into the United States any merchandise of foreign manufacture" bearing a trademark owned by a U.S. citizen or corporation, did not impose an embargo. The Court reasoned that:

> [a]n importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right.

485 U.S. at 185. The Court also explained that regulations which prohibit the importation of unlicensed or untagged dairy products and uninspected meat products do not constitute embargoes. *Id.* at 187.

The government argues that under the plain meaning of the term "embargo," the prohibition on importation of tuna constitutes an embargo. The government points to the fact that Earth Island, as well as the district court and Congress itself, has throughout the preceding litigation referred to the importation ban as an embargo. However, this fact is not itself dispositive, given that the import prohibition in *K Mart* was likewise labelled an embargo during debate in Congress. *K Mart*, 485 U.S. at 192 (Scalia, J., dissenting) (quoting 62 Cong. Rec. 11603 (1922) (remarks of Sen. Kellogg).

Earth Island argues that the ban on importation is not an embargo because it establishes certain conditions precedent to the

importation of some types of tuna from some nations, but otherwise allows the unlimited importation of any and all tuna that satisfies such conditions of entry. Earth Island analogizes to the inspection, tagging, and licensing requirements on imported meat and dairy products discussed by the Supreme Court in *K Mart*. 485 U.S. at 187.

The Supreme Court's list of examples indicates to the contrary. The prohibition on the importation of fur-seal or sea-otter skins, for instance, also forbids entry to those items unless they are "officially marked and certified" as required by statute. 19 C.F.R. §§ 12.60, 12.61. The Court nevertheless cites this prohibition as a paradigmatic embargo. *Id*. at 184.

[2] Even more to the point, we recently rejected a similar such argument under a nearly identical statute in *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). *Christopher* concluded that 16 U.S.C. § 1537(b), which bans the importation of shrimp or shrimp products harvested with commercial fishing technology that might harm sea turtles absent a certification by the government that the importing nation meets specified safety standards, is a law providing for an embargo. *Id*. at 652. The MMPA, like that statute and unlike the statute at issue in *K Mart*, involves a "governmentally imposed quantitative restriction—of zero—on the importation of merchandise." *Id*. (quoting *K Mart*, 485 U.S. at 185). It therefore is a statute providing for an embargo under the ordinary meaning of that term.

Earth Island offers one additional argument for why the CIT should not have exclusive jurisdiction. It contends that the 1980 amendments which included the adoption of § 1581(i) were never intended to expand the CIT's jurisdiction beyond adjudicating trade matters and other traditional areas. Thus, CIT's jurisdiction should be interpreted functionally and limited to areas in which it has developed expertise.

The legislative history suggests otherwise. The Customs Courts Act which contained § 1581 was designed to "clarify the

present status, jurisdiction, and powers of the Customs Court." H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731. This need for clarity arose from ongoing confusion over the precise boundary between CIT and district court jurisdiction. Admittedly, appellees' functional approach might in some circumstances make sense. But if Congress has articulated a clear jurisdictional line, it is not within the power of this court to choose another basis for determining jurisdiction--and to do so here would defeat the very clarity the underlying act sought to achieve.

[3] Moreover, the Supreme Court has already concluded that § 1581 extends jurisdiction to all kinds of embargoes, not just those rooted in trade policy or import transactions. *K Mart*, 485 U.S. at 184. We have upheld jurisdiction over an embargo against shrimp products aimed to protect sea turtles, and in doing so, we have rejected these same functional arguments. *Christopher*, 6 F.3d at 651-52.

III

[4] Earth Island's suit under the MMPA is an action arising under a law providing for embargoes. As such, it is reserved to the exclusive jurisdiction of the CIT. The district court lacked jurisdiction to enter a preliminary injunction in this case. Accordingly, that injunction is **VACATED**. This case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARTH ISLAND INSTITUTE, a California nonprofit corporation; MARINE MAMMAL FUND, a California corporation; DAVID R. BROWER,	)	
Plaintiffs-Appellees,	)	Nos. 92-15126 92-15387
v.	)	
RONALD H. BROWN,* Secretary of Commerce, et al.,	)	D.C. No. CV-88-01380-TEH
Defendants-Appellants,	)	
and	)	**ORDER**
AMERICAN TUNABOAT ASSOCIATION; JOSEPH J. MEDINA, JR. and MANUEL A. SILVA,	)	
Defendants-Intervenors.	)	

* Ronald H. Brown, the current Secretary of Commerce, is substituted for former Secretary Robert A. Mosbacher. *See* Fed. R. App. P. 43(c)(1).

Before: SNEED, POOLE, and TROTT, Circuit Judges.

The opinion in this matter filed on March 3, 1994, was withdrawn and an amended opinion was filed June 28, 1994. With the opinion thus amended, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected as of July 5, 1994.

APPENDIX D

SUBCHAPTER I - GENERALLY

§ 1361. Congressional findings and declaration of policy

The Congress finds that—

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either—

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and

recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

§ 1362. Definitions

For the purposes of this chapter—

(1) The term "depletion" or "depleted" means any case in which—

(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of this chapter, determines that a species or population stock is below its optimum sustainable population;

(B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 1379 of this title, determines that such species or stock is below its optimum sustainable population; or

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 [16 U.S.C.A. § 1531 et seq.].

(2) The terms "conservation" and "management" mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

(3) The term "district court of the United States" includes the District Court of Guam, District Court of the Virgin Islands, District Court of Puerto Rico, District Court of the Canal Zone, and, in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii.

(4) The term "humane" in the context of the taking of a marine mammal means that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.

(5) The term "intermediary nation" means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 1371(a)(2)(B) of this title.

(6) The term "marine mammal" means any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or (B) primarily inhabits the marine environment (such as the polar bear); and, for the purposes of this chapter, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.

(7) The term "marine mammal product" means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.

(8) The term "moratorium" means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products, except as provided in this chapter.

(9) The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

(10) The term "person" includes (A) any private person or entity, and (B) any officer, employee, agent, department, or

instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(11) The term "population stock" or "stock" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

(12)(A) Except as provided in subparagraph (B), the term "Secretary" means—

(i) the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this chapter with respect to members of the order Cetacea and members, other than walruses, of the order Pinnipedia, and

(ii) the Secretary of the Interior as to all responsibility, authority, funding, and duties under this chapter with respect to all other marine mammals covered by this chapter.

(B) in subchapter V of this chapter the term "Secretary" means the Secretary of Commerce.

(13) The term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

(14) The term "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and Northern Mariana Islands.

(15) The term "waters under the jurisdiction of the United States" means—

(A) the territorial sea of the United States, and

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

(15) [sic] The term "fishery" means—

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and

which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.

(16) The term "competent regional organization"—

(A) for the tuna fishery in the eastern tropical Pacific Ocean, means the Inter-American Tropical Tuna Commission; and

(B) in any other case, means an organization consisting of those nations participating in a tuna fishery, the purpose of which is the conservation and management of that fishery and the management of issues relating to that fishery.

(17) The term "intermediary nation" means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 1371(a)(2)(B) of this title. If such nation certifies and provides reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States pursuant to this section, the Secretary shall, as soon as practicable after receiving complete information regarding certification and proof, make an affirmative finding that such nation does not constitute an intermediary nation for purposes of this section.

Amendment of Paragraph (15)

Pub.L. 102-251, Title III, §§ 304, 308, Mar. 9, 1992, 106 Stat. 65, 66, provided that, effective on the date on which the Agreement between the United States and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990, enters into force for the United States, with authority to prescribe implementing regulations effective Mar. 9, 1992, but with no such regulation to be effective until the date on which the Agreement enters into force for the United States, par. (15) is amended to read as follows:

(15) The term "waters under the jurisdiction of the United States" means—

(A) the territorial sea of the United States;

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured; and

(C) the areas referred to as eastern special areas in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990; in particular, those areas east of the maritime boundary, as defined in that Agreement, that lie within 200 nautical miles of the baselines from which the breadth of the territorial sea of Russia is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured.

SUBCHAPTER II — CONSERVATION AND PROTECTION OF MARINE MAMMALS

§ 1371. Moratorium on taking and importing marine mammals and marine mammal products

(a) Imposition; exceptions

There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) Consistent with the provisions of section 1374 of this title, permits may be issued by the Secretary for taking and importation for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock if—

(A) the taking proposed in the application for any such permit, or

(B) the importation proposed to be made,

is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of this chapter. The Commission and Committee shall recommend any proposed taking or importation which is consistent with the purposes and policies of section 1361 of this title. The Secretary shall, if he grants approval for importation, issue to the importer concerned a certificate to that effect which shall be in such form as the Secretary of the Treasury prescribes and such importation may be made upon presentation of the certificate to the customs officer concerned.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commerical fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary—

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States;

(B) in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products

therefrom, to be exported to the United States, shall require that the government of the exporting nation provide documentary evidence that—

(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

(ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting,

except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels, of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless—

(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

(II) the average rate of the incidental taking by vessels of the harvesting nation is no more than 2.0 times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

(III) the total number of eastern spinner dolphin (Stenella longirostris) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (Stenella attenuata) incidentally taken by such vessels in such seasons

does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent fishing seasons is monitored by the porpoise mortality observer program of the Inter-American Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation; and

(V) the harvesting nation complies with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 1374(h)(3) of this title;

(C) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B);

(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 1978(a) of Title 22 for as long as such ban is in effect; and

(E)(i) except as provided in clause (ii), in the case of fish or products containing fish harvested by a nation whose fishing vessels engage in high seas driftnet fishing, shall require that the government of the exporting nation provide documentary evidence that the fish or fish product was not harvested with a large-scale driftnet in

the South Pacific Ocean after July 1, 1991, or in any other water of the high seas after January 1, 1993, and

(ii) in the case of tuna or a product containing tuna harvested by a nation whose fishing vessels engage in high seas driftnet fishing, shall require that the government of the exporting nation provide documentary evidence that the tuna or tuna product was not harvested with a large-scale driftnet anywhere on the high seas after July 1, 1991.

For purposes of subparagraph (E), the term "driftnet" has the meaning given such term in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note), except that, until January 1, 1994, the term "driftnet" does not include the use in the northeast Atlantic Ocean of gillnets with a total length not to exceed five kilometers if the use is in accordance with regulations adopted by the European Community pursuant to the October 28, 1991, decision by the Council of Fisheries Ministers of the Community.

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 1372, 1373, 1374, and 1381 of this title permitting and governing such taking and importing, in accordance with such determinations: ***Provided, however,*** That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter: ***Provided further, however,*** That no marine

mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this chapter. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(B) Except for scientific research purposes or enhancing the survival or recovery of a species or stock as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal..

(4)(A) During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment—

(i) finds that the total of such taking during such five-year period will have a negligible impact on such species or stock; and

(ii) provides guidelines pertaining to the establishment of a cooperative system among the fishermen involved for the monitoring of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain, the permission to take marine mammals under subparagraph (A) if the Secretary finds, after notice and opportunity for public comment, that—

(i) the taking allowed under subparagraph (A) is having more than a negligible impact on the species or stock concerned; or

(ii) the policies, purposes and goals of this chapter would be better served through the application of this title without regard to this subsection.

Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment—

(i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this title or, in the case of a cooperative agreement under both this chapter and the Whaling Convention Act of 1949 [16 U.S.C.A. § 916 et seq.], pursuant to section 1382(c) of this title; and

(ii) prescribes regulations setting forth—

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and

(II) requirements pertaining to the monitoring and reporting of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as

appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that—

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) the requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(b) Exemptions for Alaskan natives

Except as provided in section 1379 of this title, the provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

(1) is for subsistence purposes; or

(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: ***Provided,*** That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: ***And provided further,*** That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term

"authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and

(3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this chapter, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this chapter. Such regulations shall be prescribed after notice and hearing required by section 1373 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

(c) Hardship exemption

In order to minimize undue economic hardship to persons subject to this chapter, other than those engaged in commercial fishing operations referred to in subsection (a)(2) of this section, the Secretary, upon any such person filing an application with him and upon filing such information as the Secretary may require showing, to his satisfaction, such hardship, may exempt such person or class of persons from provisions of this chapter for no more than one year from October 21, 1972, as he determines to be appropriate.

§ 1372. Prohibitions

(a) Taking

Except as provided in sections 1371, 1373, 1374, 1379, 1381, 1383, and 1383a of this title or subchapter V of this chapter, it is unlawful—

(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this subchapter or by any statute implementing any such treaty, convention, or agreement—

(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

(3) for any person, with respect to any marine mammal taken in violation of this subchapter, to possess that mammal or any product from that mammal;

(4) for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; and

(5) for any person to use, in a commercial fishery, any means or methods of fishing in contravention of any regulations or limitations, issued by the Secretary for that fishery to achieve the purposes of this chapter.

(b) Importation of pregnant or nursing mammals; depleted species or stock; inhumane taking

Except pursuant to a permit for scientific research, or for enhancing the survival or recovery of a species or stock, issued

under section 1374(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was—

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock; or

(4) taken in a manner deemed inhumane by the Secretary.

Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if the Secretary determines that such importation is necessary for the protection or welfare of the animal.

(c) Importation of illegally taken mammals

It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was—

(A) taken in violation of this subchapter; or

(B) taken in another country in violation of the law of that country.

(2) Any marine mammal product if—

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection; or

(B) the sale in commerce of such product in the country of origin of the product is illegal;

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.

(d) Nonapplicability of prohibitions

Subsections (b) and (c) of this section shall not apply—

(1) in the case of marine mammals or marine mammal products, as the case may be, to which subsection (b)(3) of this section applies, to such items imported into the United States before the date on which the Secretary publishes notice in the Federal Register of his proposed rulemaking with respect to the designation of the species or stock concerned as depleted; or

(2) in the case of marine mammals or marine mammal products to which subsection (c)(1)(B) or (c)(2)(B) of this section applies, to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

(e) Retroactive effect

This chapter shall not apply with respect to any marine mammal taken before the effective date of this chapter, or to any marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before such date.

(f) Commercial taking of whales

It is unlawful for any person or vessel or other conveyance to take any species of whale incident to commercial whaling in waters subject to the jurisdiction of the United States.

§ 1373. Regulations on taking of marine mammals

(a) Necessity and appropriateness

The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 1361 of this title.

(b) Factors considered in prescribing regulations

In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on—

(1) existing and future levels of marine mammal species and population stocks;

(2) existing international treaty and agreement obligations of the United States;

(3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibility of implementation.

(c) Allowable restrictions

The regulations prescribed under subsection (a) of this section for any species or population stock of marine mammal may include, but are not limited to, restrictions with respect to—

(1) the number of animals which may be taken or imported in any calendar year pursuant to permits issued under section 1374 of this title;

(2) the age, size, or sex (or any combination of the foregoing) of animals which may be taken or imported, whether or not a quota prescribed under paragraph (1) of this subsection applies with respect to such animals;

(3) the season or other period of time within which animals may be taken or imported;

(4) the manner and locations in which animals may be taken or imported; and

(5) fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery.

(d) Procedure

Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to section 1371(a)(3)(A) of this title and on such regulations, except that, in addition to any other requirements imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section—

(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;

(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and

(4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations.

(e) Periodic review

Any regulation prescribed pursuant to this section shall be periodically reviewed, and may be modified from time to time in such manner as the Secretary deems consistent with and necessary to carry out the purposes of this chapter.

(f) Report to Congress

Within six months after the effective date of this chapter and every twelve months thereafter, the Secretary shall report to the public through publication in the Federal Register and to the Congress on the current status of all marine mammal species and population stocks subject to the provisions of this chapter. His report shall describe those actions taken and those measures

believed necessary, including where appropriate, the issuance of permits pursuant to this subchapter to assure the well-being of such marine mammals.

§ 1374. Permits

(a) Issuance

The Secretary may issue permits which authorize the taking or importation of any marine mammal.

(b) Requisite provisions

Any permit issued under this section shall—

(1) be consistent with any applicable regulation established by the Secretary under section 1373 of this title, and

(2) specify—

(A) the number and kind of animals which are authorized to be taken or imported,

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

In any case in which an application for a permit cites as a reason for the proposed taking the overpopulation of a particular species or population stock, the Secretary shall first consider whether or not it would be more desirable to transplant a number of animals (but not to exceed the number requested for taking in the application) of that species or stock to a location not then inhabited by such species or stock but previously inhabited by such species or stock.

(c) Importation for display or research

(1) Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of

scientific research, public display, or enhancing the survival or recovery of a species or stock shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

(2) A permit may be issued for public display purposes only to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by the charging of an admission fee.

(3) A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a nonlethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or

numbers necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 1383b(b) of this title or any recovery plan developed under section 1533(f) of this title for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary—

(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

(d) Application procedures; notice; hearing; review

(1) The Secretary shall prescribe such procedures as are necessary to carry out this section, including the form and manner in which application for permits may be made.

(2) The Secretary shall publish notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data or views, with respect to the taking or importation proposed in such application.

(3) The applicant for any permit under this section must demonstrate to the Secretary that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this chapter and the applicable regulations established under section 1373 of this title.

(4) If within thirty days after the date of publication of notice pursuant to paragraph (2) of this subsection with respect to any application for a permit any interested party or parties request a hearing in connection therewith, the Secretary may, within sixty days following such date of publication, afford to such party or parties an opportunity for such a hearing.

(5) As soon as practicable (but not later than thirty days) after the close of the hearing, or, if no hearing is held, after the last day on which data, or views, may be submitted pursuant to paragraph (2) of this subsection, the Secretary shall (A) issue a permit containing such terms and conditions as he deems appropriate, or (B) shall deny issuance of a permit. Notice of the decision of the Secretary to issue or to deny any permit under this paragraph must be published in the Federal Register within ten days after the date of issuance or denial.

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of Title 5, may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

(e) Modification, suspension, and revocation

(1) The Secretary may modify, suspend, or revoke in whole or part any permit issued by him under this section—

(A) in order to make any such permit consistent with any change made after the date of issuance of such permit with respect to any applicable regulation prescribed under section 1373 of this title, or

(B) in any case in which a violation of the terms and conditions of the permit is found.

(2) Whenever the Secretary shall propose any modification, suspension, or revocation of a permit under this subsection, the permittee shall be afforded opportunity, after due notice, for a hearing by the Secretary with respect to such proposed modification, suspension, or revocation. Such proposed action by the Secretary shall not take effect until a decision is issued by him after such hearing. Any action taken by the Secretary after such a hearing is subject to judicial review on the same basis as is any action taken by him with respect to a permit application under paragraph (5) of subsection (d) of this section.

(3) Notice of the modification, suspension, or revocation of any permit by the Secretary shall be published in the Federal Register within ten days from the date of the Secretary's decision.

(f) Possession of permit by issuee or his agent

Any permit issued under this section must be in the possession of the person to whom it is issued (or an agent of such person) during—

(1) the time of the authorized or taking [sic] importation;

(2) the period of any transit of such person or agent which is incident to such taking or importation; and

(3) any other time while any marine mammal taken or imported under such permit is in the possession of such person or agent.

A duplicate copy of the issued permit must be physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of storage, transit, supervision, or care.

(g) Fees

The Secretary shall establish and charge a reasonable fee for permits issued under this section.

(h) General permits

(1) Consistent with the regulations prescribed pursuant to section 1373 of this title and to the requirements of section 1371 of this title, the Secretary may issue general permits for the taking of such marine mammals, together with regulations to cover the use of such general permits.

(2)(A) Subject to subparagraph (B), the general permit issued under paragraph (1) on December 1, 1980 to the American Tunaboat Association is extended to authorize and govern the taking of marine mammals incidental to commercial purse seine fishing for yellowfin tuna during each year after December 31, 1984.

(B) The extension granted under subparagraph (A) is subject to the following conditions:

(i) The extension shall cease to have force and effect at the time the general permit is surrendered or terminated.

(ii) The permittee and certificate holders shall use the best marine mammal safety techniques and equipment that are economically and technologically practicable.

(iii) During the period of the extension, the terms and conditions of the general permit that are in effect on the date of the enactment of this paragraph shall apply, except that—

(I) the Secretary may make such adjustments as may be appropriate to those terms and conditions that pertain to fishing gear and fishing practice requirements and to permit administration;

(II) any such term and condition may be amended or terminated if the amendment or termination is based on the best scientific information available, including that obtained under the monitoring program required under paragraph (3)(A); and

(III) during each year of the extension, not to exceed 250 coastal spotted dolphin (Stenella attenuata) and not to exceed 2,750 eastern spinner dolphin (Stenella longirostris) may be incidentally taken under the general permit, and no accidental taking of either species is authorized at any time when incidental taking of that species is permitted.

(iv) The Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown. The Secretary may waive or otherwise modify such regulations for—

(I) a designated certificate holder on an observed trip if the Secretary determines, based on observer reports, that such restriction is not necessary because the certificate holder has consistently utilized fishing techniques, and equipment so as to result in an incidental marine mammal mortality rate during sundown sets that is no higher than the average such rate for the fleet during daylight sets; or

(II) all certificate holders on observed trips if the Secretary determines that such restriction is not necessary because all certificate holders have developed and are utilizing fishing techniques and equipment that assure that the incidental marine mammal mortality rate during sundown sets will be no higher than such rate during daylight sets.

(v) The Secretary may authorize, after public notice and opportunity for comment, designated certificate holders to conduct experimental fishing operations on observed trips, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce the incidental mortality of marine mammals in the course of commercial yellowfin tuna fishing operations, and the Secretary may waive such terms and conditions of the general permit and this section, other than the quotas on incidental taking of marine mammals and the prohibition

against encircling pure schools of certain species of marine mammals, as the Secretary determines to be necessary and appropriate for the conduct of such experimental fishing.

(vi) The Secretary, after public notice and opportunity for comment and consultation with the skippers' panel of experts established pursuant to the general permit, shall develop and implement by not later than the beginning of the 1990 fishing season a system of performance standards to maintain the diligence and proficiency of certificate holders in the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The system shall include such arrangements as are necessary for the identification of certificate holders whose incidental marine mammal mortality rate is consistently and substantially higher than the average rate of the fleet, and for the supplemental training and observation of such certificate holders, and provisions for suspension or revocation of certificates of inclusion of those certificate holders whose unacceptably high rate of incidental taking reflects a lack of diligence or proficiency in the use of the best marine mammal safety techniques and equipment.

(vii) It shall be unlawful to use any explosive devices other than class C explosive pest control devices in the course of commercial yellowfin tuna fishing subject to the general permit. The Secretary shall prescribe regulations, effective April 1, 1990, to prohibit or restrict the use of class C explosive pest control devices in the course of commercial yellowfin tuna fishing unless the Secretary determines, based on a study which the Secretary shall undertake, that the use of such devices does not result in physical impairment or increased mortality of marine mammals.

(viii) During the 1989 and subsequent fishing seasons, each certificated vessel shall carry on every fishing trip subject to this subsection an official observer certified by the Secretary or by the Inter-American Tropical Tuna Commission for the purpose of conducting research and observing fishing operations unless, for reasons beyond the

control of the Secretary, an observer is not available for such purpose. The Secretary may waive this requirement after the 1991 fishing season and establish a less extensive observer program if the Secretary, after notice and opportunity for comment, determines that such an alternative program will provide sufficiently reliable information.

(ix) The Secretary shall annually convene meetings with representatives of conservation and environmental organizations, the commercial tuna fishing industry, and other interested persons for the purpose of discussing the results of efforts to reduce the incidental mortality and serious injury of marine mammals under this subsection as well as throughout the international fleet as a whole and developing plans for such efforts during the next year. On or before April 1, 1992, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a comprehensive report on the results of such efforts. The report shall discuss the results of the scientific research programs, performance standards, observer program, prohibition on sundown sets, development of alternative fishing techniques, and other efforts required by this section, and shall include recommendations for such action as the Secretary considers necessary and desirable to reduce further the total mortality and serious injury of marine mammals in the course of commercial yellowfin tuna fishing throughout the international fleet.

(C) The quota on the incidental taking of coastal spotted dolphin and eastern spinner dolphin under paragraph (2)(B)(iii)(III) shall be treated—

(i) as within, and not in addition to, the overall annual quota under the general permit on the incidental taking of marine mammals; and

(ii) for purposes of paragraph (2)(B)(iii)(II), as a term of the general permit in effect on July 17, 1984.

(3)(A) The Secretary shall, commencing on January 1, 1985, undertake a scientific research program to monitor for at least five consecutive years, and periodically as necessary thereafter, the

indices of abundance and trends of marine mammal population stocks which are incidentally taken in the course of commercial purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean.

(B) If the Secretary determines, on the basis of the best scientific information available (including that obtained under the monitoring program), that the incidental taking of marine mammals permitted under the general permit referred to in paragraph (2) is having a significant adverse effect on a marine mammal population stock, the Secretary shall take such action as is necessary, after notice and an opportunity for an agency hearing on the record, to modify the applicable incidental take quotas or requirements for gear and fishing practices (or both such quotas and requirements) for such fishing so as to ensure that the marine mammal population stock is not significantly adversely affected by the incidental taking.

(C) For each year after 1984, the Secretary shall include in his annual report to the public and the Congress under section 1373(f) of this title a discussion of the proposed activities to be conducted each year as part of the monitoring program required by subparagraph (A).

(D) There are authorized to be appropriated to the Department of Commerce for purposes of carrying out the monitoring program required under this paragraph not to exceed $4,000,000 for the period beginning October 1, 1984, and ending September 30, 1988.

§1411. Findings and policy

(a) Findings

The Congress finds the following:

(1) The yellowfin tuna fishery of the eastern tropical Pacific Ocean has resulted in the deaths of millions of dolphins.

(2) Significant awareness and increased concern for the health and safety of dolphin populations has encouraged a change in fishing methods worldwide.

(3) United States tuna fishing vessels have led the world in the development of fishing methods to reduce dolphin mortalities in the eastern tropical Pacific Ocean and United States tuna processing companies have voluntarily promoted the marketing of tuna that is dolphin safe.

(4) Nations harvesting yellowfin tuna in the eastern tropical Pacific Ocean have indicated their willingness to participate in appropriate multilateral agreements to reduce, and eventually eliminate, dolphin mortality in that fishery.

(b) Policy

It is the policy of the United States to—

(1) eliminate the marine mammal mortality resulting from the intentional encirclement of dolphins and other marine mammals in tuna purse seine fisheries;

(2) secure appropriate multilateral agreements to reduce, and eventually eliminate, the mortality referred to in paragraph (1);

(3) ensure that the market of the United States does not act as an incentive to the harvest of tuna caught in association with dolphins or with driftnets;

(4) secure appropriate multilateral agreements to ensure that United States tuna fishing vessels shall have continued access to productive tuna fishing grounds in the South Pacific Ocean and elsewhere; and

(5) encourage observer coverage on purse seine vessels fishing for tuna outside of the eastern tropical Pacific Ocean in a fishery in which the Secretary has determined that a regular and significant association occurs between marine mammals and tuna, and in which tuna is harvested through the use of purse seine nets deployed on or to encircle marine mammals.

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No. 94-475

In the Supreme Court of the United States

OCTOBER TERM, 1994

EARTH ISLAND INSTITUTE, MARINE MAMMAL FUND, ET AL., PETITIONERS

v.

RONALD H. BROWN, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this action in the district court to enforce 16 U.S.C. 1371(a)(2), which bans the importation of fish caught with commercial technology that causes excessive harm to ocean mammals, was properly dismissed because it falls within 28 U.S.C. 1581(i)(3), which grants the Court of International Trade exclusive jurisdiction over actions that "arise[] out of any law of the United States providing for * * * embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety."

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. B1-B8) is reported at 28 F.3d 76. The opinion of the district court (Pet. App. A1-A18) is reported at 785 F. Supp. 826.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1994. A petition for rehearing was denied on July 5, 1994. Pet. App. C1-C2. The petition for a writ of certiorari was filed on September 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, petitioners filed this action against certain federal officials in the United States District Court for the Northern District of California.[1] Petitioners alleged that the government was failing to enforce provisions of the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, limiting the incidental killing and injury of marine mammals by tuna fishing fleets in the eastern tropical Pacific Ocean that use "purse seine" nets. See 16 U.S.C. 1371(a)(2)(A)-(C) (1988 & Supp. V 1993). In August 1991, petitioners moved for summary judgment and sought preliminary and permanent injunctive relief "regarding [the] intermediary nation embargo" (C.A. App. 38) set forth in 16 U.S.C. 1371(a)(2)(C) (Supp. V 1993):

> The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary —
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> * * * * *
>
> (C) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are

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[1] Respondents are the Secretary of Commerce, the Secretary of the Treasury, the Administrator of the National Oceanic and Atmospheric Association, and the Assistant Administrator of the National Marine Fisheries Service. See Pet. App. B3.

subject to a direct ban on importation under subparagraph (B).[2]

The district court granted a preliminary injunction that prohibits the government "from permitting the importation into the United States of all yellowfin tuna and tuna products from any intermediary nation" pending certification of that nation's compliance, and requires the government "to implement forthwith a program to enforce the secondary embargo" prescribed in Section 1371(a)(2)(C). Pet. App. A16-A17.[3] The district court refused, however, to grant petitioners summary judgment or a permanent injunction. *Id.* at A15-A16.

2. The United States Court of Appeals for the Ninth Circuit vacated the preliminary injunction, holding that "the district court lacked jurisdiction" to issue it. Pet. App. B3. The court of appeals determined that exclusive

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[2] As the district court's opinion and petitioners' pleadings reflect, the ban imposed by Section 1371(a)(2)(C) is called a "secondary embargo" (Pet. App. A1), because it aids the "primary embargo" (*id.* at A2) imposed by Section 1371(a)(2)(B) on nations whose yellowfin tuna harvesting takes too many dolphins. Section 1371(a)(2)(C) prevents "tuna laundering"—*i.e.*, the importation of tuna subject to the primary embargo after prior sale in an "intermediary nation." See Pet. App. A2-A3. Section 1371(a)(2)(C) was amended in 1992 in respects not relevant to the question presented here. For the sake of consistency with the court of appeals' opinion (see Pet. App. B4 n.1), we refer to the amended version of the provision in this brief.

[3] The district court and the court of appeals denied respondents' application for a stay of the district court's order granting a preliminary injunction. Although the court of appeals later issued a decision vacating that injunction, it stayed its mandate pending disposition of the instant petition. Consequently, the preliminary injunction remains in effect. Twenty intermediary nations were subject to the embargo when the injunction was entered; three nations are now subject to the embargo.

jurisdiction over this action lies in the Court of International Trade (CIT) under 28 U.S.C. 1581(i)(3), which provides in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> * * * * *
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.

The court of appeals observed that the question "whether [petitioners'] MMPA suit * * * is an action which arises out of a law 'providing for embargoes'" (Pet. App. B5) is governed by *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), which "addressed the meaning of 'embargo' as that term is used in 28 U.S.C. § 1581" (Pet. App. B5). The court of appeals determined that the statutory ban on the importation of tuna, upon which petitioners' suit was based, is analogous in all relevant respects to the regulatory ban on the importation of fur-seal and sea-otter skins that this Court cited in *K Mart* as an example of a law providing for an "embargo" within the meaning of 28 U.S.C. 1581. Pet. App. B7, citing 485 U.S. at 184. The court rejected petitioners' argument that Section 1581 limits the jurisdiction of the CIT to "trade matters and other traditional areas." Pet. App. B7-B8. The court concluded that such a "functional approach" to interpreting Section 1581 would be at odds with this Court's recognition in *K Mart* that "[Section] 1581 extends [the CIT's] jurisdiction to all kinds of

embargoes, not just those rooted in trade policy or import transactions." Pet. App. B8, citing *K Mart*, 485 U.S. at 184.

ARGUMENT

The court of appeals correctly relied on this Court's decision in *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), to hold that this action falls within the exclusive jurisdiction of the Court of International Trade (CIT) under 28 U.S.C. 1581(i)(3). Further review therefore is not warranted.

1. Petitioners err in contending that the decision below conflicts with *K Mart*. Pet. 12-19. To the contrary, *K Mart* strongly supports the court of appeals' holding that 16 U.S.C. 1371(a)(2)(C) (Supp. V 1993), the provision of the Marine Mammal Protection Act (MMPA) upon which this action is based, is a law "providing for embargoes" within the meaning of 28 U.S.C. 1581(i)(3), and that this action therefore falls within the exclusive jurisdiction of the CIT.[4]

Section 1371(a)(2)(C) plainly imposes an "embargo" as that term was construed in *K Mart*. The Court there held that Congress intended the term "embargo" to have its "ordinary meaning" in 28 U.S.C. 1581(i)(3): *i.e.*, "a

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[4] Moreover, the Ninth Circuit's decision in this case is consistent, as the panel below recognized (Pet. App. B7), with the Ninth Circuit's prior decision in a case brought by petitioner Earth Island Institute, in which the Ninth Circuit held that a "nearly identical statute" (*ibid.*) was a law "providing for embargoes" within the meaning of 28 U.S.C. 1581(i)(3). *Earth Island Inst.* v. *Christopher*, 6 F.3d 648, 651-652 (1993). Rather than seek certiorari in that prior case, petitioner Earth Island filed a new action, asserting the same claims, in the CIT. See *Earth Island Inst., et al.* v. *Warren Christopher, Secretary of State, et al.*, CIT No. 94-06-00321 (compl. filed June 6, 1994).

governmentally imposed quantitative restriction—of zero—on the importation of merchandise." *K Mart*, 485 U.S. at 184, 185. Section 1371(a)(2)(C) imposes such a governmental restriction; "zero" is the quantity of "merchandise" (yellowfin tuna and tuna products) that may be imported from intermediary nations under the statute, in the absence of the required certification. Thus, as the court of appeals observed, Section 1371(a)(2)(C) closely resembles the regulatory ban on the importation of fur-seal and sea-otter skins that this Court cited in *K Mart* as an example of a law providing for an "embargo" within the meaning of 28 U.S.C. 1581. Pet. App. B7, citing 485 U.S. at 184.[5]

Petitioners argue that Section 1371(a)(2)(C) "does not erect a trade embargo" because it "is not directed to international trade." Pet. 13. The CIT's exclusive jurisdiction under 28 U.S.C. 1581(i)(3), however, is not limited to cases involving *trade* embargoes; it extends, with specified exceptions, to cases arising under "any law * * * providing for * * * embargoes." Moreover, there is "no evidence that Congress intended to constrain the ordinary meaning of the word 'embargoes' to mean embargoes that are grounded in trade policy.'" *K Mart*, 485 U.S. at 184.[6]

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[5] Petitioners argue that Section 1371(a)(2)(C) does not impose an "embargo" because it does not restrict imports from a nation that provides the certification specified in the statute. Pet. 14. The court of appeals correctly rejected that argument, noting that the regulatory ban on the importation of fur-seal and sea-otter skins cited in *K Mart* as an example of an embargo similarly did not prohibit the entry of items that were "'officially marked and certified' as required by statute." Pet. App. B7, quoting 19 C.F.R. 12.60, 12.61.

[6] Petitioners err in suggesting that the decision below is "inconsistent" (Pet. 17 n.15) with *Japan Whaling Ass'n* v. *Ameri-*

2. Under 28 U.S.C. 1581(i)(3), the CIT does not have exclusive jurisdiction over an action based on a law providing for an embargo "for * * * the protection of the public health or safety." Petitioners argue that, even if the MMPA provision upon which they rely, Section 1371(a)(2)(C), imposes an "embargo," it is an embargo "for * * * the protection of the public health

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can Cetacean Society, 478 U.S. 221 (1986). The issue there was whether the Secretary of Commerce was required under the Pelly and Packwood Amendments to certify that Japan's whaling practices diminished the effectiveness of the International Convention for the Regulation of Whaling because that country's annual whale harvests exceeded quotas established under the Convention. *Id.* at 223. A certification by the Secretary would have required the Secretary to reduce Japan's fishery allocation in United States waters by at least 50%. See 16 U.S.C. 1821(e)(2)(B). Such a sanction, however, is not an embargo, because it does not restrict the importation of goods; instead, it restricts the activity of foreign fishing vessels with respect to fisheries subject to the exclusive management authority of the United States. See 16 U.S.C. 1821(e)(1). The Secretary's certification also empowered the President in his discretion to impose additional import restrictions, some of which may have constituted embargoes. See 22 U.S.C. 1978(a)(4). It is doubtful that the attenuated link between the Secretary's certification and the possibility of discretionary sanctions by the President constituting an embargo would have made the case one within the exclusive jurisdiction of the CIT under 28 U.S.C. 1581(i)(3). In any event, neither the parties nor this Court in *Japan Whaling* addressed that jurisdictional question; thus, the decision is inapposite. See, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) ("this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us"), quoting *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974). Moreover, even an express holding that the exclusivity provision of Section 1581(i)(3) does not extend to the attenuated circumstance presented in *Japan Whaling* would be entirely consistent with the decision of the court of appeals in this case.

or safety," and that this case therefore falls outside the CIT's jurisdiction under Section 1581(i)(3). Pet. 24-26.

Petitioners did not raise that argument in the court of appeals, however, and that court accordingly did not address it.[7] This Court ordinarily does not review arguments that were neither raised nor addressed in the courts below. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioners offer no reason for this Court to depart from that practice in this case. To the contrary, petitioners offer a compelling reason against such a departure when they acknowledge (Pet. 17 n.15) that no other lower court has addressed the issue whether Section 1371(a)(2)(C) imposes an embargo "for * * * the protection of the public health or safety" within the meaning of 28 U.S.C. 1581(i)(3).

In any event, petitioners' argument is without merit. Petitioners reason that "[a]lthough the MMPA is directly concerned with the health and safety of marine mammals and the marine ecosystem, protection of the ecosystem very obviously promotes human health and safety." Pet. 24. The same reasoning, however, could be applied to the regulatory ban on the importation of fur-seal and sea-otter skins that this Court in *K Mart* indicated would constitute an embargo within Section 1581(i)(3). See 485 U.S. at 184. More fundamentally, petitioners' reasoning proves too much. Most embargoes, including embargoes implementing trade policy, could be said to promote human safety and health in some sense. Petitioners' reasoning thus would exclude from the

[7] The jurisdictional issue was not raised by any of the parties in the district court until the government sought a stay of the preliminary injunction (see Pet. 10).

CIT's exclusive jurisdiction under Section 1581(i)(3) even cases involving classic trade embargoes.

3. Petitioners contend that the decision below "will * * * oust federal district and appellate courts from their traditional role in the enforcement of a variety of * * * environmental statutes." Pet. 16. Petitioners' twin concerns are that the CIT (in their view) lacks the expertise to enforce environmental statutes and that cases which do not really involve "embargoes" will end up in the CIT. See Pet. 18-19. Those concerns, however, do not warrant further review in this case.

As the court of appeals correctly recognized, the statute granting jurisdiction to the CIT over cases involving embargoes must be applied as written. Pet. App. B8. The court of appeals therefore properly rejected the "functional approach" urged by petitioners, which would require a case-by-case determination of whether an action falls within the CIT's expertise. *Ibid.* That some embargoes may be imposed "to protect * * * ecology" (*K Mart*, 485 U.S. at 184), rather than to implement trade policy, is no reason to ignore the terms of the statute including the former type of embargoes within the CIT's exclusive jurisdiction.

Furthermore, although it may sometimes be difficult to decide whether a particular statute "provid[es] for embargoes" within the meaning of Section 1581(i)(3), this is not such a case. An "embargo" is precisely what petitioners sought (C.A. App. 38) and what the district court erroneously granted (Pet. App. A17). Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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